APPENDIX.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-953

MICHAEL O' SHEA, AS MAGISTRATE OF THE CIRCUIT COURT FOR ALEXANDER COUNTY, ILLINOIS, ET AL.,
Petitioners,

vs.

EZELL LITTLETON, ET AL.

No. 72-955

W. C. SPOMER, ET AL.,

vs.

EZELL LITTLETON, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR CERTIORARI FILED JANUARY 3, 1973
CERTIORARI GRANTED APRIL 2, 1973

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APPENDIX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

July 23, 1970—Plaintiffs' Verified Complaint filed in U. S. District Court for the Eastern District of Illinois.

August 25, 1970—Defendants' motion to strike complaint and to dismiss cause (O'Shea and Spomer).

September 14, 1970—Defendant's motion to dismiss or in the alternative motion to strike (Berbling—now succeeded by W. C. Spomer).

October 8, 1970—Plaintiffs' motion for leave to file Amended Complaint.

October 8, 1970—Order granting plaintiffs' motion to file Amended Complaint.

October 29, 1970—Defendants' motion to dismiss or in the alternative motion to strike Amended Complaint (Berbling and Shepherd).

November 10, 1970—Defendants' election to stand on motion to strike complaint and dismiss cause. (O'Shea and Spomer).

March 23, 1971—Memorandum and Order of the District Court for the Eastern District of Illinois.

April 15, 1971—Plaintiffs' notice of appeal to Seventh Circuit.

October 6, 1972—Opinion and judgment Court of Appeals for the Seventh Circuit.

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Illinois

Filed July 23, 1970

EZELL LITTLETON, MANKER HARRIS, JAMES WILSON, RUSSELL DEBERRY, ROBERT MARTIN, PRESTON EWING, JR., JAMES BROWN, HERMAN WHITFIELD, LEROY LAMBERT, by his Father and Next Friend, HOBERT LAMBERT, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

PEYTON BERBLING, individually and as States Attorney for Alexander County, Illinois, CARL MEISENHEIMER, as Police Commissioner of the City of Cairo, Illinois, ROY BURKE, as Chief of Police of the City of Cairo, Illinois, MICHAEL O'SHEA, as Magistrate of the Circuit Court for Alexander County, Illinois, DOROTHY SPOMER, as Associate Circuit Judge for Alexander County, Illinois,

Defendants.

Civil Action
No. 70-103

Equitable Relief
Requested

VERIFIED COMPLAINT

1. This is a civil action under Title 42 U. S. C. sections 1983, 1985 and 1986, for damages and for a preliminary and permanent injunction and other equitable relief, to enjoin the deprivation, under color of law, custom and usage of Alexander County and the City of Cairo, Illinois, of plaintiffs and members of their class rights, privileges and immunities guaranteed by the First, Sixth, Eighth, Thir-

teenth and Fourteenth Amendments to the Constitution of the United States and by Title 42 U. S. C. sections 1983, 1985 and 1986.

2. Jurisdiction is conferred on this Court by Title 28 U. S. C. sections 1331 and 1343(3) and (4). The amount in controversy exceeds ten thousand dollars.

3(a). Plaintiffs are black citizens of the City of Cairo, Alexander County, the State of Illinois and United States, with the exception of plaintiff Harris and Brown, who are white citizens of the City of Cairo, Alexander County, the State of Illinois and the United States.

(b) They bring this action as a class action, individually and on behalf of all other persons similarly situated.

(c) The class includes all those who, on account of their race or creed and because of their exercise of First Amendment rights, have in the past and continue to be subjected to the unconstitutional and selectively discriminatory enforcement and administration of criminal justice in Alexander County.

4(a). Plaintiffs are financially poor persons.

(b) They bring this action as a class action, individually and on behalf of all other persons similarly situated.

(c) The class includes all those who, on account of their poverty, are unable to afford bail, or are unable to afford counsel and jury trials in city ordinance violation cases.

5. As to said classes of persons:

(a) they are so numerous that joinder of all members is impracticable; (b) there are questions of laws and fact common to the class; (c) the claims of plaintiffs are typical of the claims of the class; (d) plaintiffs will fairly and adequately protect the interests of the class; and (e) defendant has acted and refuses to act on grounds generally applicable to the classes, thereby making appropriate final relief with respect to the class as a whole.

6(a). Defendant Berbling is, and was at all times mentioned herein, the States Attorney for Alexander County, and a citizen and resident of that County, the State of Illinois and the United States.

(b) As States Attorney he is the chief prosecuting attorney for said county.

(c) He has authority to determine when criminal complaints may be filed and warrants issued, whether and how to prosecute violations of state statutes, what the charges should be against accused persons, and also to recommend dismissals and reductions of charges, optimum sentences, and the terms thereof.

(d) On information and belief defendant Berbling may also recommend the amount of bond and whether a convicted defendant should pay costs.

7. Defendant Meisenheimer is, and was at all times mentioned herein, a Police Commissioner of the City of Cairo, and a citizen and resident of the City of Cairo, State of Illinois, and the United States. As such he supervises the activities of the Cairo Police Department and is the immediate supervisor of defendant Roy Burke.

8. Defendant Burke is and was at all times mentioned herein, the Chief of Police of the City of Cairo. He is a citizen and resident of said city, the State of Illinois, and the United States. As Chief of Police, he has the authority to enforce the ordinances of the City of Cairo and the laws of the State of Illinois. He is the chief law enforcement officer of the city and as such directly administers the affairs of the Cairo City Police Department.

9(a) Defendant O'Shea is, and was at all times mentioned herein, the Magistrate for the Circuit Court of Alexander County, and a citizen and resident of that County, the State of Illinois and the United States. As such, he has the authority to set bond for all persons

charged with crime either under state law or city ordinance. He also has the authority to handle preliminary hearings, trials of ordinance violations and misdemeanors. In each of such cases, he determines the outcome and, in the case of ordinances and misdemeanors, the sentence to be imposed.

(b) Defendant Spomer is, and was at all times mentioned herein, the Associate Circuit Judge for Alexander County, Illinois, and citizen and resident of that county, the State of Illinois and the United States. As such, she had the authority to act in all criminal matters in Alexander County.

FIRST CLAIM FOR RELIEF

10. Since the early 1960's black citizens of Cairo, together with a small number of white persons on their behalf, have been actively, peaceably and lawfully seeking equality of opportunity and treatment in employment, housing, education, participation in governmental decision making and in ordinary day-to-day relations with white citizens and officials of Cairo. As an important part of their protest plaintiffs have participated in and encouraged others to participate in an economic boycott of merchants of the City of Cairo who plaintiffs consider have engaged in racial discrimination.

11. This active and lawful seeking after long overdue constitutional rights has generated and continues to generate a great deal of tension and antagonism from the white citizens and officials of Cairo.

12(a). Defendant Berbling has long been one of those citzens and officials who have, on information and belief, stood against plaintiffs and their class.

(b) Defendant was an organizer and officer of the Committee of Ten Million, also known as the "White Hats", an organization, on information and belief, designed to

deter plaintiffs and their class from seeking or obtaining their constitutional rights.

(c) Said organization was formed in 1967 and in 1969 was ordered to disband by the State of Illinois as an illegal vigilante organization.

13. As is hereinafter set forth more fully, defendant Berbling has engaged in, and continues to engage in, a pattern and practice of conduct under color of law, custom and usage of Alexander County, Illinois, in the administration of criminal justice in said county, all of which has deprived and continues to deprive plaintiffs and members of their class of their rights to due process of law and the equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States.

14. Defendant Berbling has denied and continues to deny to plaintiffs and members of their classes as described in paragraphs 3 and 4 herein of their constitutional rights in the following ways:

(a) It has been and continues to be the practice of defendant to refuse to initiate criminal proceedings and to refuse to hear criminal charges against members of the white race upon the complaints of members of the plaintiff class, for example:

(1) On March 28, 1969, defendant refused to permit James Wilson to file criminal charges against a white man who pointed a gun at him as he (Wilson) attempted to move into the house next door to Charlie Sullivan on 22nd Street, in Cario, Illinois. Sullivan threatened Wilson with the gun and told him to move the truck containing household furnishings and leave the area.

(2) In January 1970 defendant refused to permit Robert Martin to file charges against a white man, Charlie Sullivan, who tried to run him down

in a truck while peacefully marching in exercise of his First Amendment rights.

(3) In June 1970 defendant refused to permit Ezell Littleton to file charges against a white man who without cause or justification assaulted and battered him.

(4) In June 1970 defendant refused to permit Rev. Manker Harris to file charges against two white policemen of the City of Cairo for attempted murder and/or malicious prosecution.

(5) In May 1969 plaintiff Ewing and eight others could have and desired to bring criminal charges against a white man who threatened them with a shotgun, but did not because they knew of defendants practice of refusing to take complaints and were discouraged from making useless gestures.

(b) It has been and continues to be the practice of defendant Berbling in the few criminal proceedings he has instituted against white persons at the behest of plaintiffs, to inadequately prosecute the cases in order to lose, or to settle them on terms more favorable than those against blacks;

(c) It has been and continues to be the practice of defendant Berbling to request or recommend, in cases involving plaintiffs and members of their class, substantially greater bonds and sentences than requested or recommended in cases involving white persons;

(d) It has been and continues to be the practice of defendant to charge plaintiffs and members of their class with significantly more serious charges for conduct which would result in no charge or a minor charge against a white person.

15. Each of said practices is carried out wilfully and maliciously with intent to deprive plaintiffs and members of their class of the benefits of the criminal justice system of Alexander County.

16. Each of said practices is carried out wilfully and maliciously with intent to deter plaintiffs and members of their class from engaging in a peaceful boycott and other activities protected by the First Amendment to the Constitution of the United States.

17. Each of said practices is carried out in violation of the rights of plaintiffs and their class under the First, Thirteenth and Fourteenth Amendments to the Constitution of the United States.

18. Plaintiffs and their class have no adequate remedy at law for the deprivation of their constitutional rights by defendant as hereinabove set forth. Unless this Court issues an injunction as prayed for, plaintiffs and the plaintiff class will suffer irreparable harm.

Wherefore, plaintiffs respectfully pray that:

1. Defendant be preliminarily and permanently enjoined from depriving plaintiffs and members of the plaintiff class of their constitutional rights in the manner set forth in paragraph 14 of this complaint, and that defendant be required to submit a monthly report to this Court concerning the nature, status and disposition of any complaint brought to him by plaintiffs or members of their class, or by white persons against plaintiffs or members of their class;

2. Defendant be preliminarily and permanently enjoined from requesting more severe bond and sentences for plaintiffs and members of their class than for white persons;

3. Defendant be preliminarily and permanently enjoined from setting more severe charges against plaintiffs

and members of their class than against white persons;

4. This Court maintain continuing jurisdiction in this action;

5. Grant to plaintiffs their costs and reasonable attorneys fees; and

6. Grant such other relief as to the Court may seem just and proper.

SECOND CLAIM FOR RELIEF

19. Plaintiffs reallege the allegations of paragraphs 1-3, 5-6 and 10-17.

20. Each of the named plaintiffs suffered humiliation, despair, frustration, great anxiety, and physical distress as a result of the practices of defendant alleged in paragraph 14, and in particular by defendant's refusal to permit plaintiffs to initiate criminal proceedings.

Wherefore, plaintiffs respectfully pray that:

1. This Court grant to each of them damages in the amount of $1,000 as compensatory damages and $1,500 as punitive damages.

2. This Court award plaintiffs their costs and reasonable attorneys fees; and

3. This Court grant such other relief as may be just and proper.

THIRD CLAIM FOR RELIEF

21. Plaintiffs reallege the allegations in paragraphs 1-3, 5, 7-8, and 10-11.

22. As hereinafter set forth more fully, defendants Burke and Meisenheimer have engaged in, and continue to engage in, a pattern and practice of conduct, under color of law, custom and usage of the City of Cairo, Illinois, in the enforcement of criminal justice in said city,

all of which has deprived and continues to deprive plaintiffs and members of their class of their rights to due process of law and to the equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States.

23. Defendants Burke and Meisenheimer have denied and continue to deny to plaintiffs and members of their class their constitutional rights in the following ways:

(a) Defendants have made or caused to be made or cooperated in the making of arrests and the filing of charges against plaintiffs and members of their class where such charges are not warranted and are merely for the purpose of harassment and to discourage and prevent plaintiffs and their class from exercising their constitutional rights.

(b) Defendants have made or caused to be made or cooperated in the making of arrests and the filing of charges against plaintiffs and members of their class where there may be some colorable basis to the arrest or charge, but the crime defined in the charge is much harsher than is warranted by the facts and is far more severe than like charges would be against a white person.

24. Each of said practices is carried out with intent to deprive plaintiffs and members of their class of the benefits of the criminal justice system of Alexander County.

25. Each of said practices is carried out with intent to deter plaintiffs and members of their class from engaging in a peaceful boycott and other activities protected by the First Amendment to the Constitution of the United States.

26. Each of said practices is carried out in violation of the rights of plaintiffs and their class under the First, Thirteenth and Fourteenth Amendments to the Constitution of the United States.

27. Plaintiffs and their class have no adequate remedy at law for the deprivation of their constitutional rights by defendants as herein set forth. Unless this Court issues an injunction as prayed for, plaintiffs and the plaintiff class will suffer irreparable harm.

Wherefore, plaintiffs respectfully pray that:

1. Defendants be preliminarily and permanently enjoined from depriving plaintiffs and members of the plaintiff class of their constitutional rights in the manner set forth in paragraph 23 of this complaint, and that defendants be required to submit a monthly report to this Court concerning the nature, status and details of each arrest of and each charge filed against plaintiffs or members of plaintiff class in which the Police Department of the City of Cairo was involved in any way;

2. This Court maintain continuing jurisdiction in this action;

3. Grant to plaintiffs their costs and reasonable attorneys fees; and

4. Grant such other relief as to the Court may seem just and proper.

FOURTH CLAIM FOR RELIEF

28. Plaintiffs reallege the allegations in paragraphs 1-5, and 9-11.

29. As herein after set forth more fully, defendants O'Shea and Spomer have engaged in and continue to engage in, a pattern and practice of conduct, under color of law, custom and usage of Alexander County, Illinois, in the administration of criminal justice in said county, all of which has deprived and continues to deprive plaintiffs and members of their class of their rights to due process of law and to the equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States.

30. Defendants O'Shea and Spomer have denied and continue to deny to plaintiffs and members of their class their constitutional rights in the following ways:

(a) They set bond in criminal cases without regard to the Constitution and statutes of the State of Illinois requiring that bond be merely an assurance that defendant will appear in court when required, not that it be a punishment, in that they follow an unofficial bond schedule wihout regard to the facts of a case or circumstances of an individual defendant, all in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

(b) On information and belief they set sentences higher for plaintiffs and members of plaintiff class than for white persons and impose harsher conditions.

(c) It is the custom and practice of defendants O'Shea and Spomer to require plaintiffs and members of their class when charged with violations or city ordinances which carry fine and possible jail penalties if the fine cannot be paid, to pay for a trial by jury, all in violation of their rights under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

31. Each of said practices is carried out with intent to deprive plaintiffs and members of their class of the benefits of the criminal justice system of Alexander County.

32. Each of said practices is carried out with intent to deter plaintiffs and members of their class from engaging in a peaceful boycott and other activities protected by the First Amendment to the Constitution of the United States.

33. Each of said practices is carried out in violation of the rights of plaintiffs and their class under the First, Thirteenth and Fourteenth Amendments to the Constitution of the United States.

34. Plaintiffs and their class have no adequate remedy at law for the deprivation of their constitutional rights by defendants as herein set forth. Unless this Court issues an injunction as prayed for, plaintiffs and the plaintiff class will suffer irreparable harm.

Wherefore, plaintiffs respectfully pray that:

1. Defendants be preliminarily and permanently enjoined from depriving plaintiffs and members of their class of their constitutional rights in the manner set forth in paragraph 30;

2. Grant to plaintiffs their costs and attorneys fees herein; and

3. Grant such other and further relief as to the Court may seem just and proper.

Respectfully submitted,

/s/ Martha M. Jenkins
Martha M. Jenkins
Lawyers' Committee for
Civil Rights Under Law
909 Washington Avenue
Cairo, Illinois 62914

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Illinois

[Caption Omitted in Printing]

VERIFICATION

We, the undersigned, being duly sworn, say:

1. We are plaintiffs named in the annexed complaint and bring this suit on our behalf and on behalf of all other persons similarly situated.

2. We have read the annexed complaint and know the contents thereof.

3. We know of our own personal knowledge or believe that all of the facts stated therein are true except such as are stated on information and belief, and as to those facts, we believe them to be true.

/s/ JAMES W. BROWN
James W. Brown
/s/ EZELL LITTLETON
Ezell Littleton
/s/ JAMES WILSON
James Wilson
/s/ PRESTON EWING, JR.
Preston Ewing, Jr.

Subscribed and sworn to before me this 21st day of July.

/s/ CLYDIA M. KOEN
Notary Public

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Illinois

Filed October 23, 1970

[Caption Omitted in Printing]

AMENDED COMPLAINT

Plaintiffs, Ezell Littleton, Manker Harris, James Wilson, Carl Hampton, Hazel James, Walter Garrett, Charles Koen, Frank Washington, Curtis Johnson, Cheryl Garrett, Yvonda Taylor, Russell Deberry, Robert Martin, Preston Ewing, Jr., James Brown, Herman Whitfield, Wallace Whitfield, Leroy Lambert, by his father and next friend, Hobert Lambert, Morris Garrett, by his father and next friend, Levi Garrett, individually and as representatives of a class, by their attorneys, Martha Jenkins, James B. O'Shaughnessy and Alan M. Wiseman, complain of defendants, Peyton Berbling, individually and as State's Attorney for Alexander County, Illinois, Earl Sheperd, individually and as investigator for Peyton Berbling, Carl Meisenheimer, as Police Commissioner of the City of Cairo, Illinois, Michael O'Shea, as Magistrate of the Circuit Court for Alexander County, Illinois, and Dorothy Spomer, as Associate Circuit Judge for Alexander County, Illinois. Plaintiffs state as follows:

1. This is a civil-action under Title 42 U. S. C. Sections 1981, 1982, 1983, and 1985 for damages and for preliminary and permanent injunctions and other equitable relief, to enjoin the deprivation, under color of law, custom and usage of Alexander County and the City of Cairo, Illinois, of plaintiffs and members of their class rights, privileges and immunities guaranteed by the First, Sixth, Eighth, Thirteenth and Fourteenth Amendments to the Constitution of the United States and by Title 42 U. S. C. Sections 1981, 1982, 1983, and 1985.

2. Jurisdiction is conferred on this Court by Title 28 U. S. C. sections 1331 and 1343.

3(a) Plaintiffs are black citizens of the City of Cairo, Illinois, with the exception of plaintiffs Manker Harris and James Brown, who are white citizens of the City of Cairo, Illinois.

(b) They bring this action as a class action, individually and on behalf of all other persons similarly situated in the City of Cairo, Illinois.

(c) The class includes all those who, on account of their race or creed and because of their exercise of First Amendment rights, have in the past and continue to be subjected to the unconstitutional and selectively discriminatory enforcement and administration of criminal justice in Alexander County.

4(a) Plaintiffs are financially poor persons.

(b) They bring this action as a class action, individually and on behalf of all other persons similarly situated in the City of Cairo, Illinois.

(c) The class includes all those who, on account of their poverty, are unable to afford bail, or are unable to afford counsel and jury trials in city ordinance violation cases.

5. As to said classes of persons:

(a) they are so numerous that joinder of all members is impracticable; (b) there are questions of law and fact common to the class; (c) the claims of plaintiffs are typical of the claims of the class; (d) plaintiffs will fairly and adequately protect the interests of the class; and (e) defendants have acted and refuse to act on grounds generally applicable to the classes, thereby making appropriate final relief with respect to the class as a whole.

6(a) Defendant Berbling is, and was at all times mentioned herein, the State's Attorney for Alexander County, Illinois and a citizen and resident of that County.

(b) As State's Attorney he is the chief prosecuting attorney for said county.

(c) He has authority to determine when criminal complaints may be filed and warrants issued, whether and how to prosecute violations of state statutes, what the charges should be against accused persons, and also to recommend dismissals and reductions of charges, length of sentences, and the terms thereof.

(d) On information and belief defendant Berbling may also recommend the amount of bond and whether a convicted defendant should pay costs.

7. Defendant Meisenheimer is, and was at all times mentioned herein, a Police Commissioner of the City of Cairo, and a citizen of the City of Cairo, Illinois. As such he supervises the activities of the Cairo Police Department.

8(a). Defendant O'Shea is, and was at all times mentioned herein, the Magistrate for the Circuit Court of Alexander County, Illinois and a citizen of that County. As such, he has the authority to set bond for all persons charged with crime either under state law or city ordinance. He also has the authority to handle preliminary hearings, trials of ordinance violations and misdemeanors. In each of such cases, he determines the outcome and, in the case of ordinances and misdemeanors, the sentence to be imposed.

(b) Defendant Spomer is, and was at all times mentioned herein, the Associate Circuit Judge for Alexander County, Illinois, and a citizen of that county. As such, she has the authority to act in all criminal matters in Alexander County.

9. Defendant Earl Shepherd is, and was at all times mentioned herein, employed by the Office of the State's Attorney as an investigator and assistant to defendant Berbling, and a citizen of Alexander County, Illinois.

FIRST CLAIM FOR RELIEF

10. Since the early 1960's black citizens of Cairo, Illinois, together with a small number of white persons on their behalf, have been actively, peaceably and lawfully seeking equality of opportunity and treatment in employment, housing, education, participation in governmental decision making and in ordinary day-to-day relations with white citizens and officials of Cairo. As an important part of their protest, plaintiffs have participated in and encouraged others to participate in an economic boycott of merchants of the City of Cairo who plaintiffs consider have engaged in racial discrimination.

11. This active and lawful seeking after long overdue constitutional rights has generated and continues to generate a great deal of tension and antagonism from the white citizens and officials of Cairo.

12. As is hereinafter set forth more fully, defendant Berbling has engaged in, and continues to engage in, a pattern and practice of conduct under color of law, custom and usage of Alexander County, Illinois, in the administration of criminal justice in said county, which has deprived and continues to deprive plaintiffs and members of their class of their rights to due process of law and the equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States and the right to be free from the vestiges of slavery as secured by the Thirteenth Amendment and of rights secured by laws of the United States, *viz.*, Sections 1981, 1982 and 1983 of Title 42, United States Code.

13. Defendant Berbling, with a purpose of depriving plaintiffs of equal protection of the laws or equal privileges and immunities under the law, with a purposeful intent to discriminate upon the basis of race and creed, under color of state law and authority, deprives plaintiffs of rights and

privileges as citizens of the United States by neglecting to provide for their personal safety, although knowing of the possibility of racial disorders, by refusing to prosecute those who threaten plaintiffs' safety and property and by refusing to permit plaintiffs to give evidence against white persons respecting acts threatening their personal safety and property, with the design to intimidate plaintiffs so as to chill their exercise of the First Amendment right to assemble peaceably and their right to hold property to the same extent as is enjoyed by white citizens.

14. Defendant Berbling has denied and continues to deny to plaintiffs and members of their classes as described in paragraphs 3 and 4 herein of their constitutional rights in the following ways:

(a) It has been and continues to be the practice of defendant to refuse to initiate criminal proceedings and to refuse to hear criminal charges against members of the white race upon the complaints of members of the plaintiffs' class and to deprive plaintiffs of their right to give evidence affecting their security, for example:

(1) On March 28, 1969, defendant refused to permit James Wilson to file criminal charges against Charlie Sullivan, a white man, who pointed a gun at him as he (Wilson) attempted to move into the house next door to Charlie Sullivan on 22nd Street, in Cairo, Illinois. Sullivan threatened Wilson with the gun and told him to move the truck containing household furnishings and leave the area, thereby attempting to prevent James Wilson from holding property.

(2) On or about March 29, 1969, defendant refused to permit James Wilson to file criminal charges against Charlie Sullivan who fired shots from a gun around James Wilson's home to in-

timidate his family in order to prevent James Wilson from holding property.

(3) In January, 1970, defendant refused to permit Robert Martin to file charges against Charlie Sullivan, who tried to run him down in a truck while peacefully marching in exercise of his First Amendment rights.

(4) In June, 1970, defendant refused to permit Ezell Littleton to file charges against a white man who without cause or justification assaulted and battered him.

(5) In June, 1970, defendant refused to permit Rev. Manker Harris to file charges against two white policemen of the City of Cairo for attempted murder and/or malicious prosecution.

(6) On August 10, 1970, defendant Berbling, through a subordinate, defendant Earl Shepherd, refused to permit plaintiff Hazel James to file criminal charges against Raymond Hurst, a white man, who had kicked plaintiff James in the stomach while she was peacefully demonstrating against the racially discriminatory practices of merchants and of public officials of the City of Cairo.

(7) In May, 1969, Plaintiff Ewing and eight others could have and desired to bring criminal charges against a white man who threatened them with a shotgun, but did not because they knew of defendant's practice of refusing to take complaints and were discouraged from making useless gestures.

(b) It has been and continues to be the practice of defendant Berbling in those instances where complaints have been filed by black persons against white persons involving misdemeanors to submit such to a grand jury, rather than proceed by information or complaint,

and to interrogate complainants and witnesses before the grand jury with a purposeful intent to discriminate upon the basis of race and creed, thereby depriving plaintiffs and members of their class of their right to give evidence affecting their security and thereby chill their exercise of their right to assemble peaceably, for example: Morris Garrett (a 13 year old boy), on August 8, 1970, during a demonstration against the racially discriminatory practices of merchants and public officials of the City of Cairo, was struck by one Tom Madra. A complaint was filed which was presented to the grand jury. Morris Garrett appeared before the grand jury. Defendant Berbling, rather than questold him regarding the incident, asked him such questions as "did you get paid for picketing?" A no-true bill was returned by the grand jury.

(c) It has been and continues to be the practice of defendant Berbling, in those instances where complaints have been filed by black persons against white persons involving misdemeanors, to submit such to a grand jury, rather than proceed by information or complaint, and, in some instances, fail to interrogate at all the complainant and witnesses respecting the incident, purposefully intending to discriminate upon the basis of race and creed, thereby depriving plaintiffs and members of their class of their right to give evidence affecting their security and thereby chill their exercise of their right to assemble peaceably, for example:

(1) On August 13, 1970, Cheryl Garrett and Yvonda Taylor, ages 18 and 16 respectively, were shot at by one Jack Guetterman, Jr. Rev. Walter Garrett and Ezell Littleton, following a telephone call from the young girls, went to the scene of the shooting. Shortly thereafter police officers ar-

rived. While Rev. Walter Garrett was discussing the situation with one police officer, one Jack Guetterman, Sr. struck Rev. Garrett in the face, causing him to fall to the ground. A complaint was filed by Rev. Walter Garrett respecting this incident. Defendant Berbling presented the complaint to the grand jury, but Rev. Garrett was not interrogated at all respecting the incident. Ezell Littleton, who witnessed the assault, was not called to testify.

(2) On or about August 8, 1970, Curtis Johnson was struck by one Al Moss while demonstrating against the racially discriminatory practices of merchants and public officials of the City of Cairo. A complaint was filed, which was presented to the grand jury. Curtis Johnson, however, was not interrogated by defendant Berbling respecting the incident.

(d) It has been and continues to be the practice of defendant Berbling in the few criminal proceedings he has instituted against white persons at the behest of plaintiffs to inadequately prosecute the cases in order to lose or to settle them on terms more favorable than those against blacks;

(e) It has been and continues to be the practice of defendant Berbling to request or recommend, in cases involving plaintiffs and members of their class, substantially greater bonds and sentences than requested or recommended in cases involving white persons;

(f) It has been and continues to be the practice of defendant Berbling to charge plaintiffs and members of their class with significantly more serious charges for conduct which would result in no charge or a minor charge against a white person.

(g) Defendant Berbling has sought to deprive plaintiffs of their right to give evidence respecting the security of members of their class by seeking the dropping of a criminal charge arising out of a complaint filed by Frank Hollis, a black person, against Tom Madra, a white person, in return for which defendant would drop pending criminal charges against several of the plaintiffs.

15. Each of said practices is carried out wilfully and maliciously with intent to deprive plaintiff and members of their class of the benefits of the criminal justice system of Alexander County and to deprive plaintiffs and members of their class of the right to give evidence against those who threaten their security, peace, and tranquility and the right to hold property as enjoyed by white citizens.

16. Each of said practices is carried out wilfully and maliciously with intent to deter plaintiffs and members of their class from engaging in a peaceful boycott and other activities protected by the First Amendment to the Constitution of the United States.

17. Each of said practices is carried out in violation of the rights of plaintiffs and their class under the First, Thirteenth and Fourteenth Amendments to the Constitution of the United States and of rights secured by laws of the United States, viz., Sections 1981, 1982 and 1983 of Title 42, United States Code.

18. Plaintiffs and their class have no adequate remedy at law for the deprivation of their constitutional rights by defendant as hereinabove set forth. Unless this Court issues an injunction as prayed for, plaintiffs and the plaintiff classes will suffer irreparable harm.

Wherefore, plaintiffs respectfully pray that:

1. Defendant be preliminarily and permanently enjoined from depriving plaintiffs and members of the plaintiff class of their constitutional rights in the manner set

forth in paragraphs 13 and 14 of this complaint, and that defendant be required to submit a monthly report to this Court concerning the nature, status and disposition of any complaint brought to him by plaintiffs or members of their class, or by white persons against plaintiffs or members of their class.

2. Defendant be preliminarily and permanently enjoined from neglecting his duties of office in failing to interrogate impartially and without discrimination witnesses before the grand jury.

3. Defendant be preliminarily and permanently enjoined from requesting more severe bond and sentences for plaintiffs and members of their class than for white persons;

4. Defendant be preliminarily and permanently enjoined from setting more severe charges against plaintiffs and members of their class than against white persons;

5. This Court maintain continuing jurisdiction in this action;

6. Grant to plaintiffs their costs and reasonable attorneys' fees; and

7. Grant such other relief as to the Court may seem just and proper.

SECOND CLAIM FOR RELIEF

19. Plaintiffs reallege the allegations of paragraphs 1-3, 5-6 and 10-17.

20. Each of the named plaintiffs suffered humiliation, despair, frustration, great anxiety, and physical distress as a result of the practices of defendant alleged in paragraphs 12-14, and in particular by defendant's refusal to permit plaintiffs to initiate criminal proceedings, to give evidence, and to benefit from laws protecting their security to the same extent as white citizens.

Wherefore, plaintiffs respectfully pray that:

1. This Court grant to each of them damages in the amount of $1,000 as compensatory damages and $1,500 as punitive damages.

2. This Court award plaintiffs their costs and reasonable attorneys fees; and

3. This Court grant such other relief as may be just and proper.

THIRD CLAIM FOR RELIEF

21. Plaintiffs reallege the allegations of paragraphs 1-3, 5-6, 9-13 and 15-16.

22. Defendant Berbling in conspiracy with defendant Shepherd, with a purpose of depriving plaintiffs of equal protection of the laws or equal privileges and immunities under the law, with a purposeful intent to discriminate upon the basis of race and creed, under color of state law and authority, deprived plaintiffs of rights and privileges as citizens of the United States, as follows:

(a) Defendants Berbling and Shepherd have conspired to deprive plaintiffs of equal protection of the laws by neglecting to provide for their personal safety, because of their race, although knowing of the possibility of racial disorders, by refusing to prosecute those who threaten plaintiffs' safety.

(b) Defendants Berbling and Shepherd have conspired to prevent plaintiffs from giving evidence against white persons respecting acts threatening their personal safety with the design to intimidate plaintiffs so as to chill their exercise of the First Amendment right to asemble peaceably. For example, on Saturday, August 8, 1970, plaintiff Hazel James was peacefully demonstrating against the racially discriminatory practices of merchants and public officials of the City of Cairo pursuant to a boycott when she was kicked in

the stomach by one Raymond Hurst. Plaintiff James was rushed to a hospital for treatment of the injury sustained. On Monday, August 10, 1970, plaintiff James sought to file a complaint, but defendant Shepherd, at defendant Berbling's direction, refused to allow it.

23. Such practices are carried out in violation of the rights of plaintiffs and their class under the First, Thirteenth and Fourteenth Amendments to the Constitution of the United States and of rights secured by laws of the United States, *viz.*, Sections 1981, 1982, 1983 and 1985 of Title 42, United States Code.

Wherefore, plaintiffs respectfully pray that:

1. This Court grant to each of them damages in the amount of $1,000 as compensatory damages and $1,500 as punitive damages.

2. This Court award plaintiffs their costs and reasonable attorneys fees; and

3. This Court grant such other relief as may be just and proper.

Fourth Claim for Relief

24. Plaintiffs reallege the allegations of paragraphs 1-3, 5, 9-11, 15-17 and 20.

25. Defendant Shepherd has engaged in, and continues to engage in, a pattern and practice of conduct under color of law, custom and usage of Alexander County, Illinois, which has deprived and continues to deprive plaintiffs and members of their class of their rights to due process of law and the equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States and of rights secured by laws of the United States, *viz.*, Sections 1981, 1982 and 1983 of Title 42, United States Code.

26. Defendant Shepherd, with a purpose of depriving plaintiffs of equal protection of the laws or equal privileges and immunities under the law, with a purposeful intent to discriminate upon the basis of race and creed, under color of state law and authority, deprives plaintiffs of rights and privileges as citizens of the United States by refusing to permit plaintiffs to give evidence against white persons respecting acts threatening their personal safety, with the design to intimidate plaintiffs so as to chill their exercise of the First Amendment right to assemble peaceably; for example:

On August 10, 1970, defendant Shepherd refused to permit plaintiff Hazel James to file criminal charges against one Raymond Hurst, a white man, who, on August 8, 1970, had kicked plaintiff James in the stomach while she was peacefully demonstrating against the racially discriminatory practices of merchants and public officials of the City of Cairo.

Wherefore, plaintiffs respectfully pray that:

1. This Court grant to each of them damages in the amount of $1,000 as compensatory damages and $1,500 as punitive damages.

2. This Court award plaintiffs their costs and reasonable attorneys fees; and

3. This Court grant such other relief as may be just and proper.

FIFTH CLAIM FOR RELIEF

27. Plaintiffs reallege the allegations in paragraphs 1-3, 5, 7 and 10-11.

28. As hereinafter set forth more fully, defendant Meisenheimer has engaged in, and continues to engage in, a pattern and practice of conduct, under color of law, custom and usage of the City of Cairo, Illinois, in the enforcement

of criminal justice in said city, all of which has deprived and continues to deprive plaintiffs and members of their class of their rights to due process of law and to the equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States and of rights secured by laws of the United States, *viz.*, Sections 1981, 1982, 1983, 1985, and 1986, Title 42, United States Code.

29. Defendant Meisenheimer has denied and continues to deny to plaintiffs and members of their class their constitutional rights in the following ways:

(a) Defendant has made or caused to be made or cooperated in the making of arrests and the filing of charges against plaintiffs and members of their class where such charges are not warranted and are merely for the purpose of harassment and to discourage and prevent plaintiffs and their class from exercising their constitutional rights.

(b) Defendant has made or caused to be made or cooperated in the making of arrests and the filing of charges against plaintiffs and members of their class where there may be some colorable basis to the arrest or charge, but the crime defined in the charge is much harsher than is warranted by the facts and is far more severe than like charges would be against a white person.

30. Each of said practices is carried out with intent to deprive plaintiffs and members of their class of the benefits of the criminal justice system of Alexander County.

31. Each of said practices is carried out with intent to deter plaintiffs and members of their class from engaging in a peaceful boycott and other activities protected by the First Amendment to the Constitution of the United States.

32. Each of said practices is carried out in violation of the rights of plaintiffs and their class under the First,

Thirteenth and Fourteenth Amendments to the Constitution of the United States.

33. Plaintiffs and their class have no adequate remedy at law for the deprivation of their constitutional rights by defendants as herein set forth. Unless this Court issues an injunction as prayed for, plaintiffs and the plaintiff class will suffer irreparable harm.

Wherefore, plaintiffs respectfully pray that:

1. Defendant be preliminarily and permanently enjoined from depriving plaintiffs and members of the plaintiff class of their constitutional rights in the manner set forth in paragraph 29 of this complaint, and that defendants be required to submit a monthly report to this Court concerning the nature, status and details of each arrest of and each charge filed against plaintiffs or members of plaintiff class in which the Police Department of the City of Cairo was involved in any way;

2. This Court maintain continuing jurisdiction in this action;

3. Grant to plaintiffs their costs and reasonable attorneys fees; and

4. Grant such other relief as to the Court may seem just proper.

SIXTH CLAIM FOR RELIEF

34. Plaintiffs reallege the allegations in paragraphs 1-5 and 8 and 10-11.

35. As hereinafter set forth more fully, defendants O'Shea and Spomer have engaged in and continue to engage in, a pattern and practice of conduct, under color of law, custom and usage of Alexander County, Illinois, in the administration of criminal justice in said county, all of which has deprived and continues to deprive plaintiffs and members of their class of their rights to due process of

law and to the equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States.

36. Defendants O'Shea and Spomer have denied and continue to deny to plaintiffs and members of their class their constitutional rights in the following ways:

(a) They set bond in criminal cases without regard to the Constitution and statutes of the State of Illinois requiring that bond be merely an assurance that defendant will appear in court when required, not that it be a punishment in that they follow an unofficial bond schedule without regard to the facts of a case or circumstances of an individual defendant, all in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

(b) On information and belief they set sentences higher for plaintiffs and members of plaintiffs' class than for white persons and impose harsher conditions.

(c) It is the custom and practice of defendants O'Shea and Spomer to require plaintiffs and members of their class when charged with violations or city ordinances which carry fines and possible jail penalties if the fine cannot be paid, to pay for a trial by jury, all in violation of their rights under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

37. Each of said practices is carried out with intent to deprive plaintiffs and members of their class of the benefits of the criminal justice system of Alexander County.

38. Each of said practices is carried out with intent to deter plaintiffs and members of their class from engaging in a peaceful boycott and other activities protected by the First Amendment to the Constitution of the United States.

39. Each of said practices is carried out in violation of the rights of plaintiffs and their class under the First,

Thirteenth and Fourteenth Amendments to the Constitutions of the United States.

40. Plaintiffs and their class have no adequate remedy at law for the deprivation of their constitutional rights by defendants as herein set forth. Unless this Court issues an injunction as prayed for, plaintiffs and the plaintiff class will suffer irreparable harm.

Wherefore, plaintiffs respectfully pray that:

1. Defendants be preliminarily and permanently enjoined from depriving plaintiffs and members of their class of their constitutional rights in the manner set forth in paragraph 36.

2. Grant to plaintiffs their costs and attorneys fees herein; and

3. Grant such other and further relief as to the Court may seem just and proper.

Respectfully submitted,

/s/ James B. O'Shaughnessy
James B. O'Shaughnessy
/s/ Alan M. Wiseman
Alan M. Wiseman

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Illinois

Filed on August 25, 1970

[CAPTION OMITTED IN PRINTING]

MOTION TO STRIKE COMPLAINT AND DISMISS CAUSE

Now come Michael O'Shea, as Magistrate of the Circuit Court of Alexander County, Illinois and Dorothy Spomer, as Associate Circuit Judge for Alexander County, Illinois, defendants in the above entitled cause, by William J. Scott, Attorney General, and moves the court to enter its order striking the Complaint and dismissing this cause as to these defendants with prejudice and forever bar this action as to these defendants and as grounds therefor, state unto the court:

1. That the above entitled cause is a civil action.

2. That at all times mentioned in plaintiff's Complaint herein, these defendants were and still are Judges of the Circuit Court of Alexander County.

3. That at all times mentioned in the plaintiff's Complaint herein, these defendants were acting in their judicial capacity as Judges.

4. That by virtue of their judicial office and their acts and doings as judges these defendants are as a matter of law immune from civil suits based upon their judicial acts.

5. That the plaintiff's Complaint fails to state a claim against these defendants upon which relief can be granted.

6. That plaintiff's Complaint does not comply with Rule 8(e)(1) and 10(b) of the Federal Rules of Civil Procedure.

Wherefore, these defendants move that this Complaint be stricken as to them and that the cause of action as to them be dismissed with prejudice.

MICHAEL O'SHEA, Magistrate of the Circuit Court of Alexander County,
DOROTHY SPOMER, Associate Circuit Judge for the Circuit Court of Alexander County,

Defendants,

WILLIAM J. SCOTT, Attorney General of the State of Illinois,

Their Attorney.

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Illinois
Filed Oct. 29, 1970
[Caption Omitted in Printing]

Now come defendants, Peyton Berbling, individually, and as State's Attorney for Alexander County, Illinois, and Earl A. Shepherd, Jr. (erroneously sued herein as Earl Sheperd), individually, and as investigator for Peyton Berbling, State's Attorney of Alexander County, Illinois, and say:

A.

They move to dismiss the Amended Complaint herein and this action as against them, and each of them, and in support thereof, say:

1. The Amended Complaint wholly fails to state a claim upon which the relief prayed or any relief can be granted.

2. It appears from the face of the Amended Complaint that defendant, Peyton Berbling, is the duly elected, qualified and acting State's Attorney for Alexander County, Illinois, and that defendant, Earl A. Shepherd, Jr., is and was at all relevant times, an employee and assistant to the State's Attorney for Alexander County, Illinois; it further appears from the face of the Amended Complaint that the matters and things complained of against said defendants, and each of them, allegedly transpired while said defendants held their respective offices and while they and each of them were acting in their official capacities as such State's Attorney and his employee and assistant.

3. The matters and things alleged against each of said defendants occurred, if at all, as a result of the performance by them, and each of them of acts of a judicial or quasi-judicial nature in the official position as State's Attorney

of Alexander County, Illinois, and his employee and assistant and they are, therefore, as a matter of law immune from civil action under the Civil Rights Act mentioned in the Amended Complaint, or otherwise.

4. The paragraphs under the caption "Third Claim for Relief" and the prayers for relief thereunder, as well as all references in this action to Title 42, U. S. C., Section 1985, should be dismissed or stricken from the Amended Complaint herein for failure to state a claim upon which relief can be granted, by reason of the fact that there are no allegations of any conspiracy to prevent, by force, intimidation, or threat, plaintiffs, or any or either of them, from enjoying the rights and privileges set forth in said section.

B.

In the alternative, these defendants move that the following portions of said Amended Complaint, and each of the same, be stricken:

1. With respect to the allegations of said Amended Complaint pertaining to a Class Action, paragraphs 3(a), 3(b), 3(c), 4(a), 4(b), 4(c), 5(a) and all references to "members of their class" contained in paragraphs 12, 14, 14(a), 14(b), 14(c), 14(e), 14(f), 14(g), 15, 16, 17, 18, paragraphs 1, 3 and 4 of the prayers for relief under the caption "First Claim for Relief", and all such references in paragraphs 23 (under the caption "Second Claim for Relief") and paragraph 25 (under the capition "Fourth Claim for Relief").

2. The allegations of said Amended Complaint are wholly insufficient to warrant the maintaining of a class action under the provisions of Rule 23 of the Federal Rules of Civil Procedure.

3. It affirmatively appears from the face of the Amended Complaint that common questions of fact with respect to

the specific actions alleged against these defendants do not exist and such allegations will not support a class action.

4. The class or classes for which this action is attempted to be maintained are not sufficiently and specifically described and cannot be categorized as "black citizens of the City of Cairo, Illinois" or "those who, on account of their poverty, are unable to afford bail, or are unable to afford counsel and jury trials" within the City of Cairo, Illinois.

5. Plaintiffs are neither representative of nor authorized to act or speak for all of the black citizens or poor people of the City of Cairo, Illinois.

6. Such classes, or neither of them, cannot be defined or sufficiently described to authorize a class action.

7. The following paragraphs should be stricken from the Complaint because they are redundant, immaterial, impertinent and scandalous, in violation of Rule 12(f) of the Federal Rules of Civil Procedure, or because they contain allegations which are so vague, ambiguous and unspecific that it is impossible to prepare and prosecute a proper defense with respect thereto, all in violation of Rule 8(e)(1) of the Federal Rules of Civil Procedure, to-wit: Paragraphs 10, 11, 13, 14(a)(1), 14(a)(2), 14(a)(3), 14(a)(4), 14(a)(6), 14(a)(7), 14(b), 14(c), 14(c)(1), 14(c)(2), 14(d), 14(e), 14(f), 14(g) and 20, all of the Amended Complaint.

8. With respect to the prayers for relief against these defendants:

(a) The prayers for relief under the caption "First Claim for Relief" would involve an unwarranted and unlawful invasion of the duties and responsibilities of defendant, Peyton Berbling, as the duly elected, qualified and acting State's Attorney of Alexander County, Illinois, and would constitute an invasion of and interference with the exercise by him of his official discretion and judgment and the powers and discretion of the Grand Jury of Alexander County, Illinois; in addition, the grant-

ing of such prayers would involve interpretations and standards which are impossible of ascertainment.

(b) With respect to the prayers for relief contained under the captions "Second Claim for Relief", "Third Claim for Relief", and "Fourth Claim for Relief", there are no allegations showing or alleging that plaintiffs, or either of them, have sustained any monetary damages and there are no allegations in the Amended Complaint sufficient to entitle plaintiffs, or either of them to punitive damages.

/s/ JOHN M. FERGUSON
John M. Ferguson
One South Church Street
Belleville, Illinois 62220
277-1110 (618)

/s/ HAROLD G. BAKER, JR.
Harold G. Baker, Jr.
One South Church Street
Belleville, Illinois 62220
277-1110 (618)

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Illinois
Filed November 10, 1970
[Caption Omitted in Printing]

ELECTION TO STAND ON MOTION TO STRIKE COMPLAINT AND DISMISS CAUSE AND BRIEF IN SUPPORT OF SUCH MOTION HERETOFORE FILED

Now comes Michael O'Shea as Magistrate of the Circuit Court of Alexander County, Illinois, and Dorothy Spomer as Associate Circuit Judge for Alexander County, Illinois, defendants in the above entitled cause by William J. Scott, Attorney General of the State of Illinois, advising this court that these defendants elect to stand on their Motion to Strike Amended Complaint and Dismiss Cause. The court is further advised that these defendants adopt their brief heretofore filed in support of said Motion.

Wherefore, these defendants move that the amended complaint filed herein be stricken as to them and that the cause of action as to them be dismissed with prejudice.

MICHAEL O'SHEA,
Magistrate of the Circuit Court of Alexander County,

DOROTHY SPOMER,
Associate Circuit Judge for the Circuit Court of Alexander County,

Defendants.

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,

Their Attorney.

SUPREME COURT OF THE UNITED STATES
Office of the Clerk
Washington, D. C. 20543

April 2, 1973

Re: O'Shea v. Littleton, No. 72-953
Spomer v. Littleton, No. 72-955

Dear Sir:

The Court today took the following action in the above cases:

"The petitions for writs of certiorari are granted and the cases are set for oral argument in tandem."

Very truly yours,
MICHAEL RODAK, JR.,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-955

W. C. SPOMER, STATES ATTORNEY OF ALEXANDER COUNTY, ILLINOIS, *Petitioner,*

vs.

EZELL LITTLETON, MANKER HARRIS, JAMES WILSON, CARL HAMPTON, HAZEL JAMES, WALTER GARRETT, CHARLES KOEN, FRANK WASHINGTON, CURTIS JOHNSON, CHERYL GARRETT, YVONDA TAYLOR, RUSSELL DEBERRY, ROBERT MARTIN, PRESTON EWING, JR., JAMES BROWN, HERMAN WHITFIELD, WALLACE WHITFIELD, LEROY LAMBERT, BY HIS FATHER AND NEXT FRIEND, HOBERT LAMBERT, MORRIS GARRETT, BY HIS FATHER AND NEXT FRIEND, LEVI GARRETT, INDIVIDUALLY AND AS REPRESENTATIVES OF A CLASS, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JAMES B. ZAGEL,
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Attorneys for Petitioner.

NATIONAL DISTRICT ATTORNEYS ASSOCIATION,
ILLINOIS STATES ATTORNEYS ASSOCIATION,
BRENT F. CARLSON,
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211 West Chicago Avenue,
Hinsdale, Illinois 60521,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. ____

W. C. SPOMER, STATES ATTORNEY OF ALEXANDER COUNTY, ILLINOIS,

Petitioner,

vs.

EZELL LITTLETON, MANKER HARRIS, JAMES WILSON, CARL HAMPTON, HAZEL JAMES, WALTER GARRETT, CHARLES KOEN, FRANK WASHINGTON, CURTIS JOHNSON, CHERYL GARRETT, YVONDA TAYLOR, RUSSELL DEBERRY, ROBERT MARTIN, PRESTON EWING, JR., JAMES BROWN, HERMAN WHITFIELD, WALLACE WHITFIELD, LEROY LAMBERT, BY HIS FATHER AND NEXT FRIEND, HOBERT LAMBERT, MORRIS GARRETT, BY HIS FATHER AND NEXT FRIEND, LEVI GARRETT, INDIVIDUALLY AND AS REPRESENTATIVES OF A CLASS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on October 6, 1972.*

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* One of the original parties to this action was Peyton Berbling who was sued individually and as State's Attorney of Alexander County, Illinois. On December 4, 1972, Peyton Berbling was succeeded as State's Attorney by W. C. Spomer. Under Rule 48 (3) of this Court, Mr. Spomer is automatically substituted as a party to the extent the cause affects the State's Attorney of Alexander County.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is not reported. It is printed in the separate Appendix filed on behalf of all petitioners.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 6, 1972. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

(1)

Whether a civil rights complaint can be based upon an alleged denial to private citizens of access to state criminal courts when the state law does not grant to any private citizen the individual right to bring or to prosecute a criminal charge or to testify in any criminal case.

(2)

Whether a district court, through the use of mandatory injunction, may supervise the office of a state prosecutor, requiring him to bring certain charges and regulating the manner in which he prosecutes them.

(3)

Whether the immunity of a prosecutor from suit under the Civil Rights Act prohibits the issuance of a mandatory injunction against him requiring that he prosecute certain cases and do so in a certain manner.

(4)

Whether the complaint was sufficiently specific to state a cause of action against a state prosecutor.

STATEMENT OF THE CASE.

This matter arises from an amended complaint bringing a civil rights class action filed in the United States District Court for the Eastern District of Illinois. Nineteen named plaintiffs, all but two of whom are black citizens of Cairo and Alexander County, Illinois, seek damages and injunctive relief against the State's Attorney of Alexander County, his investigator, and a Magistrate and Associate Circuit Judge of the Circuit Court for Alexander County. The action, premised on 42 U. S. C. Sec. 1981, 1982, 1983 and 1985, sought damages and injunctive relief against the named functionaries of Alexander County for claimed deprivations, under color of law, custom and usage, of various rights and immunities secured to the plaintiffs and their class under the Constitution and the above named sections of Title 42.

During the past few years Cairo, Illinois has been an area of major civil rights activity by the black citizens seeking to alleviate alleged racial discrimination. Part of the civil rights activities involved an economic boycott of local merchants who were alleged to have engaged in racially discriminatory practices. As a result of the economic boycott and general civil rights activities in Cairo the investigative, prosecutorial and judicial officials of Alexander County were required to act. It is on the basis of the resultant actions by the local officials that the specific allegations against the Alexander County functionaries rest.

The State's Attorney is alleged to engage in a pattern of discriminatory conduct in that he refuses to allow blacks to give evidence of crimes committed by white citizens against black citizens of Cairo, refuses to initiate criminal

proceedings against whites who batter blacks, employs the grand jury as a means of delaying and defeating the complaints brought by blacks, purposely prosecutes white offenders inadequately, and discriminatorily makes bond, sentence and charging recommendations.

The named judges of Alexander County are alleged to set bond in criminal cases in a discriminatory manner and sentence black defendants to longer criminal terms and imposes harsher conditions than they do for white persons charged with similar offenses. The district court, after allowing the filing of an amended complaint, entered a Memorandum and Order dismissing the complaints for want of jurisdiction and the immunity of the officials for their judicial and quasi-judicial actions. The district court reasoned that in seeking to enjoin the elected officials of Alexander County for their discretionary acts the plaintiffs attempt to cause the federal court to substitute its judgment for that of the duly elected local officials—an action beyond the jurisdiction of the court. The lower court also held that the doctrine of judicial immunity was applicable to the named judges because the actions alleged in the complaint were taken in the course of the judicial duties. Similarly, the court held that the prosecutor and his investigator were also immune from damage claims arising out of their judicial or quasi-judicial acts.

The Court of Appeals reversed and remanded the case to the district court on the basis that the action was improperly dismissed. The Court of Appeals found that jurisdiction under 42 U. S. C. Sec. 1981 and 1983 did exist and more importantly, the reviewing court considered at length the history, nature, and scope of judicial immunity. The court analyzed the recent decisions on the scope of injunctive relief under Section 1983 and found the "exceptional circumstances" for federal court intervention by injunction of state court criminal prosecutions.

The court then considered the limitations on the concept of prosecutorial immunity and concluded that investigative activities by the prosecutor were not one of the quasi-judicial duties for which he had immunity. Though the court did not hold that the actions of Alexander County State's Attorney complained of in the pleadings were "investigative" in nature, it specifically directed the district court to consider the limitations on the prosecutor's immunity when performing investigative functions. The Court of Appeals concluded by holding that quasi-judicial immunity does not extend complete freedom from injunction to the prosecutor and that the allegations made in the complaint, if established, could merit injunctive relief.

The court, noting that its holding created a case of first impression as to the type of relief approved, volunteered guidelines as to what type of remedy might be imposed, suggesting that periodic reports containing data on bail, sentencing and dispositions of complaints be made by the local officials to the federal district court.

REASONS FOR GRANTING THE WRIT.

The Court of Appeals has established a rule which requires the District Court to exercise general supervision over the official acts of state prosecutors. Under this new doctrine the District Court must promulgate rules to govern the institution, prosecution and declination of criminal charges in state court. The prosecutor must file with the Court periodic reports of his conduct. The District Court is empowerd to make judgments upon the correctness of a decision to prosecute or decline in individual cases and upon the vigor and competence of the prosecution in any given case. The District Court can require, under pain of contempt, that the prosecutor bring a particular charge and prosecute it in a manner the District Court regards as sufficiently competent.

This case clearly presents substantial questions of the extent of federal judicial power to require a state prosecutor to require a state prosecutor to institute criminal proceedings and to take certain affirmative actions to secure convictions when such charges are filed. This case also presents important questions of the sufficiency of pleadings and the extent of prosecutorial immunity under the Civil Rights Acts. These issues will be discussed in turn.

A. THE NATURE OF THE CAUSE OF ACTION.

Certiorari Should Be Granted to Determine Whether a Civil Rights Complaint Can Be Based Upon an Alleged Denial to Private Citizens of Access to Criminal Courts in a Jurisdiction in Which No Private Citizen Has an Individual Right to Bring a Criminal Charge or to Testify in Any Criminal Case.

The Court below never offered an adequate account of the basic, individual civil right that was being violated. The complaint designated the applicable right as the "right to give evidence against those who threaten their security, peace and tranquility". The Court referred to the right of "equal access to the criminal justice system."

Under the provisions of Illinois law (which are common to most States) the contentions offered by respondents and the Court are patently invalid. In Illinois, the decision to prosecute lies solely with public prosecuting officers. The decision to bring a criminal case in the name of the People of the State of Illinois is one that can be made only by the duly elected representative of those People. A private citizen has no right to file or prosecute a criminal case. *Hayner* v. *People,* 213 Ill. 142, 72 N. E. 792 (1904). Nor does any citizen have a right to testify in a criminal case. A witness may have a duty to testify when called by the prosecution or the defense but, in the absence of being called by the parties, the witness will have neither the right nor the opportunity to testify.[1] In Illinois a private citizen, regardless of race, creed, politics or wealth, has

1. The distinction between the present case and Lane v. Correll, 434 F. 2d 598, 600 (5th Cir. 1970) is obvious. In *Lane* state law allowed a private citizen to have an arrest warrant issued upon payment of a fee. There the Court held that the refusal to issue a warrant at the request of an indigent citizen was unconstitutional since an acknowledged right was being denied solely because of inability to pay.

no right to bring a criminal case or to testify in a criminal case (unless he is the accused). The private citizen has no right to address either court or grand jury in connection with a criminal prosecution. There is, of course, a right of access to courts by private citizens in Illinois, but that right extends only to filing and prosecution of civil causes. The Illinois law places the exclusive power of criminal prosecution in the public prosecutor as does the federal law. Neither the right relied upon by respondents nor the right envisioned by the Court exist under state or federal law. In the absence of some basic enunciated right, the necessary predicate for a civil rights complaint does not exist.

B. THE REMEDY.

Certiorari Should Be Granted to Consider Whether a District Court May Assume Direct Regulation of the Office of a State Prosecutor.

The Court authorized the use of a mandatory injunction to require a state prosecutor to take certain actions. In this case there was no claim that any prosecutions were unjustifiably commenced. The gravamen of the complaint is directed against the failures of the prosecutor:

(a) to initiate criminal proceedings when the victims are members of the respondents' class;

(b) to proceed on respondents' complaints by complaint and information rather than by grand jury actions;

(c) to interrogate respondents properly before the grand jury;

(d) to prosecute adequately cases involving respondents as complainants.

It is difficult to imagine what kind of specific decree could be entered to assure that these failings be repaired. The Court clearly envisioned a general decree telling the prosecutor to do his job as it is defined by state law. The prosecutor would then be required to report on his actions to the Court on a regular basis. The prosecutor's decisions would be subject to review even in "individual cases". Under threat of contempt, a prosecutor might be compelled to bring certain charges, to present the evidence the Court thinks appropriate and to present it in a manner which meets the approval of the Court. In short, there is nothing even so personal as the prosecutor's tone of voice that is not subjected to direct judicial regulation.[2] That the Court will have to concern itself with individual cases is inevitable. "However strong the tendency may be to secure uniformity, a decision whether to prosecute or not has to be made or the particular facts and circumstances of the particular case." R. Jackson, Enforcing The Law, 53-54 (1967).

From the view of history, the Court's decision is not merely unprecedented, it runs contrary to the well-accepted view of the prosecutor's role in the administration of criminal law.

In 1868, this Court held that the decision as to whether a prosecution is to be instituted is wholly within the discretion of the prosecutor. *Confiscation Cases*, 74 U. S. (7 Wall) 454. Throughout the years, scattered attempts have been made to persuade courts to compel prosecutors to proceed with certain cases. Until the Court below ruled, none of these efforts were successful. See *United States*

2. The prohibitory injunction which has, on rare occasions, been directed against prosecutors differs from the injunction concerned here since it applies relatively objective standards and prohibits specific acts. The remedy here depends upon relatively subjective standards and must necessarily embody vague and uncertain commands.

v. *Cox*, 342 F. 2d 167 (5th Cir. 1965); *Powell* v. *Katzenbach*, 359 F. 2d 234 (D. C. Cir. 1965); *United States* v. *Brokaw*, 60 F. Supp. 100 (S. D. Ill. 1945); *Moses* v. *Kennedy*, 219 F. Supp. 762 (D. D. C. 1963).

The reasons for this refusal of the Courts to compel prosecution are well stated in several cases. "To permit the district court to compel the United States Attorney to proceed . . . would invest prosecutorial power in the judiciary," *United States* v. *Cox*, 342 F. 2d 167, 179 (dissenting opinion). Though the result has been grounded upon the separation of powers, the better view is that the scope of prosecutor's discretion "would have evolved without the doctrine and exists in countries that do not purport to accept the doctrine." *United States* v. *Cox*, 342 F. 2d 167, 193 (Wisdom, J. concurring). The power to decide whether a case will be prosecuted must be lodged somewhere and the prosecutor has been the repository of that power. See *United States* v. *Woody*, 2 F. 2d 262 (D. Mont. 1924); *United States* v. *Cox*, 342 F. 2d 167, 182 (Brown, J. concurring). The Courts have refused to require prosecution for two essential reasons: the lesser is the recognition of the superior expertise of the prosecutor and the greater is the refusal of the judiciary to exercise the powers of the prosecutor as well as those of the court.

The failure of a prosecutor to act when he should is not a matter to be taken lightly. Even so, it is the invariable rule that a "Court cannot compel him to prosecute a complaint or . . . an indictment, whatever his reasons for not acting. The remedy for any derelictions of his duty lies not with the courts but with the executive branch of government and ultimately with the people." *Pugach* v. *Klein*, 193 F. Supp. 630, 635 (S. C. N. Y. 1961).

The Court below exhibited indifference to the established rule and the rationale for it. Apparently the Court believed that whatever considerations dictate the refusal

of a federal court to review a federal prosecutor's decision not to prosecute become somehow irrelevant when the issue before the court concerns a state prosecutor. We do not think that the Civil Rights Acts altered the relationship of the States to the federal government to the extent that the direct federal judicial regulation of state prosecution is permissible. See *Younger* v. *Harris*, 401 U. S. 37 (1971).

The Court's view of the remedy to which respondents would be entitled is ill-considered and extremely unwise. Though this case involves a state prosecutor, the Court could not find any precedent for the issuance of mandatory injunction against a state prosecutor. There is dictum in *Peek* v. *Mitchell*, 419 F. 2d 575, 578-79 (6th Cir. 1970) which would support the view that a failure to prosecute states a cause of action under the Civil Rights Act but *Peek* did not approve the kind of remedy the Court here envisioned. In fact no court has ever entered or contemplated the sort of order approved below. Not one of the law review commentaries cited by the Court below proposed that the courts should compel prosecutorial action by mandamus. The only authority the Court could find to support its action was the proposition that even where a particular remedy is not provided for by statute the court is not barred from fashioning a necessary and appropriate remedy. See *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229, 239 (1969); *Jones* v. *Mayer*, 392 U. S. 409, 414 n. 3 (1968).

The fact that a court has the power to fashion a new remedy does not mean that the remedy it does fashion will be effecctive, appropriate or necessary. The Court below, to the extent it considered the issue, ruled in favor of the mandatory injunction because of two assumptions. First, the Court assumed that the alternative remedies were ineffective and, second, the Court assumed that the District

Court could effectively administer the injunctive remedy. Neither assumption is justified.

The alternative remedies against a prosecutor who violates civil rights are effective and far more appropriate than the remedy chosen by the Court below. The prosecutor is subject to criminal prosecution in federal court. The persons whom he declines to prosecute may be similarly liable to federal prosecution. No remedy is more effective since the prosecutor convicted of such is automatically removed from office under Illinois law. See Ill. Rev. Stat. Ch. 38, Sec. 124-2; Ill. Rev. Stat. Ch. 38, Section 1005-5-5 (eff. January 1, 1973); Illinois Constitution, Article XIII, Sec. 1; *People ex rel. Keenen* v. *McGuane,* 13 Ill. 2d 520, 150 N. E. 2d 168 (1958).

The private action for damages against the persons interfering with respondents' rights are also effective remedies. The Court below criticized such a remedy as piecemeal but it seems clear to us that administration of the Court's remedy will be equally piecemeal since the decision to prosecute or to decline must ultimately be reviewed in light of the individual facts of each case. Further both federal criminal prosecution and private damage actions are preferable to a mandatory injunction which requires the District Court to assume the functions of a state prosecutor. The Court below did recognize that there was at least one effective alternative remedy, *i.e.,* dismissal or reduction of charges against members of respondents class so that they will be treated "equally" with other classes. See Comment, 61 Colum. L. Rev. 1103 (1961). The Court held, without reasoning to support its conclusion, that the mandatory injunction was preferable to this alternative. In truth the alternative, draconian as it is, is better than the Courts preferred remedy because it does not require the federal court to assume and exercise *de facto* the powers of the state prosecutor.

Finally, we do not doubt that the proper role of the state prosecutor in our federal system would be better preserved if the scope of his immunity from damage actions were narrowed than it would be if the direct federal judicial supervision envisioned by the Court were allowed.

The District Court is surely not the proper entity to supervise a prosecutor's office. The function of judge is entirely different from that of prosecutor. The competence of a judge to make prosecutorial decisions and direct the use or avoidance of tactics may well be minimal or nonexistent. Entirely apart from the doctrine of separation of powers, courts have generally considered themselves incompetent to make the kinds of decisions that the Court below thinks they ought to make. There is something unseemly even when a judge particularly competent to do so directs a prosecutor to proceed with a certain case in a certain way. Courts should remove themselves from performing such functions. The Court which functions in the role of counsel, especially in the role of public prosecutor, runs a serious risk of losing its neutrality and its appearance of neutrality.

One can easily foresee the intense difficulties a District Court will encounter. The Court may, for example, order a state prosecutor to proceed on given case because its court thinks there is enough to go to a jury. If the same kind of evidence is presented in a federal prosecution, will the court be able to hear the defendant's motion for a directed verdict with a clear, uncommitted mind? If the Court orders a state prosecutor to adopt certain practices to insure that certain cases will be well prosecuted, what posture will the Court take if a convicted state court defendant challenges those practices in a federal habeas corpus proceeding? Will the state court defendant have the right to question sufficiency of evidence in state court when the federal court has already ruled on the issue? Will

the state court defendant be able to argue to the jury that he is being prosecuted by order of the federal court? Will the federal court be able to inquire of grand jurors as to why they refused to indict upon a charge that the federal court has ordered brought? Will the federal court exercise the same control over the state grand jury that it does over the prosecutor? If the prosecutor refuses to obey a court order as to an individual case, accepts a contempt citation and appeals it, will the state statute of limitations be tolled while the appeal is being decided without violating the state court defendant's rights? What remedy will a state court defendant have if he is charged and put to trial and a federal appeals court later decides that the state prosecutor could properly have declined to proceed? Will the potential state court defendant have the right to intervene in the federal proceeding challenging the prosecutor's refusal to prosecute him?[3] Will the federal court have to consider questions of admissibility of confessions, physical and identification evidence in determining whether a given case is a proper one on which to proceed? If the court does so what effect will its rulings have in state trial courts, on state appeal, on federal habeas corpus?

The Court below considered none of these problems (and the list is not exhaustive)—it resolved the question in terms of its faith that the District Court could somehow find its way through to the solution. Such a serious and far-reaching expansion of federal authority over state prosecutors demands some more persuasive rationale than the blind optimism of two circuit judges.

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3. There is something less than fair in respondent's actions here in accusing specific persons of specific crimes and asking, in effect, that prosecution be instituted against them without bothering to give notice to those persons they accuse.

C. THE PROSECUTOR'S IMMUNITY.

Certiorari Should Be Granted to Consider Whether Prosecutorial Immunity Under the Civil Rights Act Prohibits the Issuance of a Mandatory Injunction Requiring the Prosecutor to Prosecute Certain Cases and to Prosecute Them in a Manner the Court Determines to Be Effective.

The Court below rejected the claim that a prosecutor is immune from the kind of relief sought by respondents. The Court's decision must be viewed in light of its extremely grudging attitude toward the question of immunity. Initially, the opinion cited the legislative history that its author thought militated against any grant of immunity. With some regret (and some criticism of precedents on the point) it was conceded that the prosecutor had a certain degree of immunity.[4]

The Court decided that immunity did not extend to mandatory injunctions requiring the prosecutor to institute certain cases and to prosecute them in certain ways. The Court's conclusion (in part inconsistent with its own prior decision in *Arensman* v. *Brown*, 430 F. 2d 190 (7th Cir. 1970)) was based upon two premises.

First, the Court held that the highly discretionary nature of the prosecutor's actions would not require immunity from regulation by mandatory injunction. The Court's reasoning in support of its conclusion is strained. The Court agreed that discretion is involved, but then says that dis-

4. The immunity ruling which favored the prosecutor is not of concern to this petitioner whose sole concern (as the successor prosecutor) is with the mandatory injunction question. Nevertheless it is noteworthy that while the court decided there was some measure of immunity from damages, this immunity only applies to acts within the prosecutor's judicial duties. The Court then remanded to give the respondents a chance to amend their complaint. This disposition was made even though the complaints against the prosecutor largely concerned his conduct in court and before the grand jury which conduct is clearly within his judicial duties.

cretion can be abused and that abuse of discretion is subject to judicial review. It is true that abuse of discretion by a lower court is always subject to appellate review. This does not mean that any state or federal official who exercises discretion is necessarily subject to judicial control. Precedent does not support this claim. *Powell* v. *Katzenbach*, 359 F. 2d 234 (D. C. Cir. 1965).

Second, the Court analyzed the rationale against such injunctions and found them wanting:

> The principal reasons presented for various types of immunity have been capably summarized:
>
> "(1) the danger of influencing public officials by threat of a law suit; (2) the deterrent effect of potential liability on men who are considering entering public life; (3) the drain on the valuable time of the official caused by insubstantial suits; (4) the unfairness of subjecting officials to liability for the acts of their subordinates; (5) the theory that the official owes a duty to the public and not to the individual; (6) the feeling that the ballot and the formal removal proceeding are more appropriate ways to enforce the honesty and efficiency of public officers." Note, *The Proper Scope of the Civil Rights Acts*, 66 Harv. L. Rev. 1285, 1295 n. 54 (1953).
>
> Number (1), (2) and (4) would seem to apply only to civil actions for damages and not to injunctive relief which we have approved herein. Reason number (3) is a serious consideration—a prosecutor's time is necessarily limited—but since we approve not a case a serious consideration—a prosecutor's time is necbrought by a single disappointed complainant, but rather one brought by an entire class of citizens of Cairo, Illinois, the number of such suits charging discrimination against classes of citizens is not predictably substantial nor is their merit predictably insubstantial. Moreover, as to both (3) and (5) the duty owed to the public is primary and that duty is an even-handed, nondiscriminatory enforcement of the laws, not a vin-

> dication of an individual's complaint; it is that public duty which plaintiffs seek to enforce. Finally, as to (6), defendants have not argued, either before this court or in the district court, that there is a requirement of exhaustion of state legal or political remedies, an argument which we would reject in the light of *Carter* v. *Stanton*, 405 U. S. 669 (1972), no matter how potentially adequate those remedies might apear to be.

The Court's analysis is exceptionally shallow. A public official may well be influenced in his official action by a threatened law suit whether or not the suit leads to damages or to a regulatory injunction. Citizens may also be deterred from entering public office. The personal and political consequences of a regulatory injunction are sufficiently harsh to cause a public officer to do what he thinks is wrong rather than suffer a suit for refusing to act. Particularly, the average lawyer would hardly regard the office of prosecutor to be worth the effort and sacrifice it demands if his judgment and competence can be questioned in federal court by any disgruntled group of citizens. The Court of Appeals is apparently of the view that all that affects a public prosecutor or a lawyer deciding whether he will be a prosecutor is the prospect of monetary loss.[5]

Further, the Court's conclusion that these kinds of cases would not be particularly numerous and the merits as not particularly insubstantial flies in the face of the Court's own admission that the case was "of first impression" and the statements of one of the Court's principal authorities that proof of the allegations is very difficult if possible at all. Comment, 61 Colum. L. Rev. 1103 (1961). The Court does not attempt to face the problem of allowing any definable class of citizens to institute suits to force a prosecutor to act in what they believe is the public interest. Identifiable groups of citizens invariably speak for particular

5. There is an irony in this notion since many lawyers who become prosecutors must make a financial sacrifice to do so.

interests and the decrees they seek will not be directed to the general performance of the prosecutor but only to his performance in those cases that interest them. And, once a decree is entered, the court will not be a self-starting supervisor of the prosecutor's conduct. The court will presumably inquire only into those matters that are the source of particular complaints. The duty of the prosecutor is to the public as a whole and not to any individual or class of individuals.

D. THE PLEADING.

Certiorari Should Be Granted to Consider Whether a Conclusory Complaint Drafted by Attorneys Is Sufficient to State a Cause of Action Against a State Prosecutor in Light of the Potential for Abuse Inherent in Such Suits and, the Very Minimal Possibility of the Plaintiffs Prevailing.

The respondents brought a class action. They sought a federal court order requiring the county prosecutor to proceed with certain cases which he had declined to prosecute and to prosecute effectively certain cases on which he had elected to proceed. The potential scope of suits like these is awesome. Class actions may be filed by innumerable civic groups seeking to compel vigorous prosecution of certain classes of offenses which they claim are being inadequately pursued by a local prosecutor acting out of improper motives. Those who oppose abortion or pornography could file such suits where the prosecutor fails to act vigorously enough to please them. The criminal laws affecting landlords and their tenants may not be enforced consistently enough or well enough to suit either group and both may bring their complaints to a federal court and ask it to regulate state prosecution. Environmentalists and the industrialists they oppose will want to litigate prosecution

policy in a similar fashion. The list of real or imagined grievances that a class of citizens may have against a local prosecutor for failure to bring certain charges or to prosecute them adequately is endless. And it is never difficult to allege that the prosecutor's motives are based upon racial, religious or political prejudice.[6]

The fact that a particular form of action may be abused does not necessarily mean that the courts must refuse to allow its use. However the potential for abuse does have bearing upon the stringency of the requirements a court should adopt before allowing the form of action to be invoked.

The question of abuse can not be measured solely in terms of the number of suits that may be brought under a particular rubric. It is also important to determine the probability of the plaintiffs prevailing in such cases. If it is highly improbable that they will do so, the initial threshold which plaintiffs must reach in order to state a cause should be high.

A permissive pleading policy for causes which are almost certain to fail on their merits does nothing to protect the rights of potential plaintiffs, it only opens wide the door to the use of courts to harass potential defendants. The Court below recognized the problems of proof but suggested that proof might be made in the ways suggested in Comment, The Right to Nondiscriminatory Enforcement of State Penal Laws, 61 Colum. L. Rev. 1103, 1122-31 (1961). Yet in this case, the complaint alleges that some of the charges the respondents want prosecuted have been brought. Under

6. A permissive attitude toward development of suits like these will inevitably embroil the District Court in local political disputes to a degree we think in unacceptable. It would not be difficult for the supporters of a challenger for the prosecutor's office to file an adequate complaint and use the litigation process to harass and attack the incumbent. Each ruling of the District Court for either side during the campaign would assume substantial political significance.

these circumstances, i.e., bringing some of the desired charges, the article cited by the Court suggests that proof of the merits is nearly impossible. 61 Colum. L. Rev. at 1129.

The pleading here was drafted by lawyers, not uninformed laymen. Every essential allegation is conclusory in nature. The allegations could be made against any prosecutor and, if such allegations are sufficient, the prosecutor would be required to answer the complaint, to submit to extensive discovery and to consume more of the already overtaxed resources of his office in defending the suit. In order to remedy what the respondents' lawyers must have recognized was a clearly inadequate pleading, the complaint was fortified with specific factual examples. These examples involved accusations of crime made by what appear to be single witnesses. In one case the alleged criminal was not identified. In another case, the accusation was not brought to the attention of the prosecutor. There were no examples pleaded which showed that the prosecutor was willing to bring charges against other persons upon the same quantity of evidence present in the illustrative cases. In the stated examples there was no effort to show that the evidence available was of the quality necessary to secure conviction. Further, there were no factual allegations to support the claims that there is inadequate prosecution, that greater bonds are required and higher charges brought when members of plaintiffs' class are accused.

It is submitted that at the very minimum the Court below should have required a more rigorous pleading than the one it approved here.[7] If no more is required than is found here, then "every complaint against a State official by the simple expedient of averring conclusions would be cognizable in the federal courts under the Civil Rights Act."

7. A similarly conclusory petition was held insufficient to justify federal action under another provision of the Civil Rights Act. See Greenwood v. Peacock, 384 U. S. 808 (1966).

United States ex rel. Hoge v. *Bolsinger*, 211 F. Supp. 199, 201 (W. D. Pa. 1962), aff'd 371 F. 2d 215 (3rd Cir. 1962), cert. denied 372 U. S. 931 (1913).

CONCLUSION.

For the reasons given above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 72-953

MICHAEL O'SHEA AND DOROTHY SPOMER,
Petitioners,

vs.

EZELL LITTLETON, ET AL.,
Respondents.

No. 72-955

W. C. SPOMER,
Petitioner,

vs.

EZELL LITTLETON, ET AL.,
Respondents.

No. 72-1107

PEYTON BERBLING AND EARL A. SHEPHERD, JR.,
Petitioners,

vs.

EZELL LITTLETON, ET AL.,
Respondents.

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vs.

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION.

Respondents, individually and on behalf of the class of persons specified in the amended complaint, file this brief

in opposition to the several petitions for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Seventh Circuit is reported as *Littleton* v. *Berbling*, 468 F. 2d 389 (7th Cir. 1972). The opinion of the District Court for the Eastern District of Illinois is not reported.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 6, 1972. On November 3, 1972 petitioners Dorothy Spomer and Michael O'Shea filed with the Court of Appeals a Motion for Recall and Stay of the Mandate pending a petition for certiorari in this Court. The motion was denied on November 7, 1972. Petitioners Peyton Berbling and Earl A. Shepherd, Jr. did not file a similar motion. On November 22, 1972, petitioners Dorothy Spomer and Michael O'Shea filed an Application for Stay of Mandate of United States Court of Appeals for the Seventh Circuit with the Honorable William H. Rehnquist. The application was granted on November 28, 1972. That application was subsequently referred to the Court and granted on December 11, 1972. On December 13, 1972 petitioners Peyton Berbling and Earl A. Shepherd, Jr. filed an Application for Stay of Mandate of United States Court of Appeals for the Seventh Circuit with the Honorable William H. Rehnquist. The application was denied on December 19, 1972. On January 9, 1973 respondents filed with the Honorable William H. Rehnquist their Application for Extension of Time to File Brief in Opposition to Petition for Writ of Certiorari to and including March 12, 1973 so that they could file a single brief in response to the several petitions. This application was granted on

January 12, 1973. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether a federal court has the authority under the Civil Rights Act to enjoin state judges, a state's attorney, and an investigator from engaging in an invidious pattern and practice of racial discrimination in the administration of criminal justice?

2. Whether the doctrines of judicial and quasi-judicial immunity bar an action under the Civil Rights Act seeking equitable relief?

3. Whether the doctrine of quasi-judicial immunity cloaks a state's attorney with immunity from an action in damages when he engages in racial discrimination in the exercise of his office?

4. Whether the doctrine of quasi-judicial immunity applies to an investigator, employed by the Office of State's Attorney, who engages in racial discrimination?

5. Whether the amended complaint adequately states claims under the Civil Rights Act?

STATEMENT OF THE CASE.

Respondents brought this action under 42 U. S. C. §§ 1981, 1982, 1983 and 1985 (hereinafter referred to as the "Civil Rights Act") and 28 U. S. C. § 1343(3) and (4) on behalf of themselves and black persons of the City of Cairo, Illinois against the petitioners who, as public officials administering criminal justice in Alexander County, systematically discriminate against them and members of their class on the basis of race. The racial discrimination, it is alleged, has a chilling effect on respondents' exercise of their right to assemble peaceably. The constitutional rights

invaded are the First, Eighth, Thirteenth and Fourteenth Amendments.

Petitioners filed motions to dismiss the amended complaint. The district court on March 23, 1971 dismissed respondents' claims for injunctive relief on the ground of lack of jurisdiction and dismissed respondents' claims against petitioners Berbling and Shepherd for damages on the ground that the doctrine of quasi-judicial immunity bars relief. The Court of Appeals for the Seventh Circuit, on October 6, 1972, reversed the district court's decision.

The petitioners are: Dorothy Spomer and Michael O'Shea, associate judges, of the Circuit Court for Alexander County; Peyton Berbling, state's attorney for Alexander County when this case was filed; W. C. Spomer, the current state's attorney for Alexander County; Earl A. Shepherd, Jr., an investigator, not a lawyer, employed by the Office of State's Attorney.

Respondents seek equitable relief against each of the petitioners and damages against Berbling and Shepherd.

The amended complaint alleges that since the early 1960's black persons of the City of Cairo, Illinois have been actively seeking equal opportunity and treatment in such areas as employment, housing, education and ordinary day-to-day relations with white persons and officials of Cairo. In furtherance of this equality quest, respondents and members of their class encourage others to engage in an economic boycott of local merchants who engage in racial discrimination. This equality quest generated and continues to generate substantial antagonism from not only the public officials in Cairo but also the white persons. The amended complaint charges that petitioners' discriminatory administration of criminal justice inhibits respondents' exercise of their right to assemble peaceably.

Spomer and O'Shea Conduct.

Spomer and O'Shea, as judges, engage in a pattern and practice of racial discrimination[1] against respondents and members of their class as follows: They set bond in criminal cases by following an unofficial bond schedule applicable to black persons without regard to the facts of the case or circumstances of an individual defendant. They sentence black persons to longer criminal terms and impose harsher conditions than they do for white persons who are charged with the same or equivalent conduct. They require black persons, when charged with violations of City ordinances, to pay for a trial by jury, yet do not require other persons to pay for a trial by jury.[2]

Berbling Conduct.

Berbling engages in a pattern and practice of racial discrimination in the exercise of his office by refusing to permit black persons to give evidence of criminal conduct committed by white persons against black persons. He refuses to initiate criminal proceedings against white persons arising out of assaults and batteries committed by them against black persons. He refuses to proceed on black person's complaints by information. He interrogates black persons before the grand jury with the purposeful intent of depriving the black persons of their right to present their evidence to the grand jury. In some instances before the grand jury he declines to interrogate the black com-

1. It is also alleged that their discrimination is based upon economic status. The effect insofar as the right to injunctive relief is concerned is the same. *See Boddie* v. *Connecticut*, 401 U. S. 371 (1971).

2. In Illinois, a defendant has a right to a trial by jury in such cases, even if the penalty is a fine and not a jail sentence. Ill. Const., Art. 1, § 13.

plainants at all. When white persons are prosecuted on the basis of complaints by respondents, Berbling engages in a practice of inadequately prosecuting in order to lose the cases or to settle them on terms more favorable than those accorded black persons. He engages in the practice of recommending greater bonds and sentences in cases involving black persons than those of white persons. He engages in a practice of bringing significantly more serious charges against black persons for conduct which would result in no charge or a minor charge against white persons.

All of the alleged practices assertedly carried on by Berbling are willful and malicious with an intent to deprive respondents of their right to give evidence against those who threaten their security, peace and tranquility and to deprive respondents of their right to hold property to the same extent as is enjoyed by white persons and to deter respondents from engaging in a peaceful boycott and other activities protected by the First Amendment.

The amended complaint describes a number of specific examples illustrative of the complained of conduct.

After the Court of Appeals for the Seventh Circuit reversed the lower court decision, W. C. Spomer succeeded Berbling as State's Attorney and accordingly Spomer was automatically substituted as a party to the extent the cause affects the Office of State's Attorney of Alexander County as provided under Rule 48(3) of this Court. Respondents seek only equitable relief against petitioner W. C. Spomer. Because the amended complaint asks relief against Berbling in his individual as well as his official capacity, he remains a party in interest in this action.

Shepherd Conduct.

Shepherd as an investigator engages in a pattern and practice of racially discriminatory conduct in that he re-

fuses to permit respondents to give evidence against white persons respecting acts threatening their personal safety. For example, on August 10, 1970, Shepherd refused to permit respondent Hazel James, a black woman, to file criminal charges against Raymond Hurst, a white man, who kicked her in the stomach on August 8, 1970 while she peacefully demonstrated against the racially discriminatory practices of merchants and public officials. His refusal was based on the fact that Hazel James is a black person.

Shepherd and Berbling Conduct.

Shepherd and Berbling, in conspiracy, engaged in a practice of discriminatory conduct in that together they prevented respondents, because of their race, from giving evidence against white persons respecting acts threatening their personal safety.

Petitioners urge that the amended complaint does not allege that any of the plaintiffs has been a victim of their discrimination. A careful review of the amended complaint, however, refutes their contention, as noted by the Seventh Circuit. Paragraph 1 of the amended complaint provides that respondents and members of their class have been deprived by all petitioners of certain enumerated rights guaranteed by the Constitution and laws of the United States. Paragraph 3 of the amended complaint provides that respondents are members of the class on whose behalf the action is brought in addition to having brought the action individually. Paragraphs 35 and 36 of the amended complaint provide that the actions of O'Shea and Spomer, as judges, have deprived and continue to deprive respondents and members of their class of rights guaranteed by the Constitution and laws of the United States. In Paragraphs 37 and 38, it is alleged that each of the practices referred to in the amended com-

plaint is carried out with the intent to deprive "plaintiffs and members of their class of the benefit of the criminal justice system of Alexander County" and that each of such practices is carried out with the "intent to deter plaintiffs and members of their class from engaging in a peaceful boycott and other activities protected by the First Amendment to the Constitution of the United States". The amended complaint is reproduced in the Appendix to respondents' brief in opposition to the petitions for a writ of certiorari.

ARGUMENT.

I. A federal court has the authority under the Civil Rights Act to enjoin state judges, a state's attorney and an investigator from engaging in an invidious pattern and practice of racial discrimination in the administration of criminal justice.

The decisions of this Court sustain the position of the Court of Appeals for the Seventh Circuit that state judges, a state's attorney, and an investigator are not immune from the equitable powers of a federal court under the Civil Rights Act. The thrust of the civil rights statutes, which were enacted to implement the Fourteenth Amendment to eradicate the vestiges of slavery from American society, is crystal clear. They provide a mechanism whereby the federal system may intervene when a citizen is deprived of rights guaranteed to all, irrespective of race. *See Bell* v. *Hood*, 327 U. S. 678 (1946); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968). No person, irrespective of his official position, may, by design or otherwise, subject a citizen to a deprivation of any rights secured by the Constitution or laws of the United States. *See Dombrowski* v. *Pfister*, 380 U. S. 479 (1965). The fact that Spomer and O'Shea are judges, Berbling and W. C. Spomer are

state's attorneys, and Shepherd is an investigator in a state's attorney's office does not relieve them of their fealty to the Constitution and laws of the United States. *United States* v. *McLeod*, 385 F. 2d 734, 738 n.3 (5th Cir. 1967); *Ill. Rev. Stat.*, ch. 37 § 72.2 (1969); *Ill. Rev. Stat.*, ch. 14 § 1(1969). The petitioners stand in this litigation as instrumentalities of the State and thus are bound to abide by the strictures of the Constitution and laws of the United States. *Cooper* v. *Aaron*, 358 U. S. 1, 16-18 (1958).

In *Mitchum* v. *Foster*, 407 U. S. 225, 92 S. Ct. 2151 (1972), this Court stated that the Civil Rights Act fundamentally altered the federal system. As a result of the constitutional amendments and statutes passed subsequent to the Civil War,

> "the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established. . . . Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation."
>
> "It is clear from the legislative debates surrounding passage of § 1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment 'against state action, whether that action be executive, legislative, or *judicial*.'" (Emphasis in original.) *Id.* at 2160-61.

In *Cooper* v. *Aaron*, 358 U. S. 1, 17 (1958), this Court stated:

> "In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the Brown case can neither be nullified openly and directly by *state legislators or state executives or judicial officers*, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'" (Emphasis added.)

These principles, indeed, were enunciated by the Court almost a century ago. In 1880, in *Ex parte Virginia*, 100 U. S. 339, 347, this Court stated:

> "A State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it." *Id.*

The decision of the Seventh Circuit is not in conflict with this Court's decision in *Pierson* v. *Ray*, 386 U. S. 547 (1967). In *Pierson*, the Court was concerned with an action for damages, not one for equitable relief, against a state judge. Moreover, the record in *Pierson*, unlike here, was "barren of any proof or specific allegation that Judge Spencer played any role in these arrests and convictions other than to adjudge petitioners when their cases came before this Court." *Id.* 553. In the subject case it is alleged that the petitioners are engaging in a pattern and practice of racial discrimination and that they are not merely exercising discretion within the bounds of the Constitution and laws of the United States.

The Seventh Circuit decision, moreover, is consistent with decisions of other circuits. *See, e.g., Machesky* v. *Bizzell*, 414 F. 2d 283 (5th Cir. 1969); *Shaw* v. *Garrison*, 467 F. 2d 113 (5th Cir. 1972), *cert. denied*, 92 S. Ct. 1253

(1972); *Phillips* v. *Cole*, 298 F. Supp. 1049 (N. D. Miss. 1968); *Bramlett* v. *Peterson*, 307 F. Supp. 1311, 1321-22 (M. D. Fla. 1969). In general, the cases cited by petitioners are not inconsistent with these decisions. Their cases either relate to actions in damages against judges or do not involve situations of a pattern and practice of racial discrimination.

In sum this is not a case in which a federal district court is asked merely to substitute its judgment for the judgment of state judges, a state's attorney, or an investigator arising out of discretionary action in an isolated case by a disgruntled litigant. This is not a case in which injunctive relief would constitute an unwarranted intrusion into the operation of the state judiciary or office of state's attorney. Rather, this is a case in which Spomer and O'Shea, as judges, Berbling (and W. C. Spomer as his successor) as state's attorney, and Shepherd, as an investigator, use their official positions to engage in a systematic pattern of discrimination whereby persons, because of their race, are treated in a manner different from others. When state officials pervert their office by acting in such fashion in violation of the Constitution and laws of the United States, they have acted outside their judicial and quasi-judicial capacity and may be enjoined by a federal court. The exclusion of black persons from the benefits of citizenship is not within the limits of their discretion. *Cf. Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 151-2 (1970). Under these allegations, the amended complaint meets not only the standards for federal involvement under *Mitchum, supra*, but also those espoused in *Younger* v. *Harris*, 401 U. S. 37 (1971), and its companion cases. *See also Hadnott* v. *Amos*, 393 U. S. 815 (1968) and *Hadnott* v. *Amos*, 394 U. S. 358 (1969).

II. The doctrine of quasi-judicial immunity does not cloak a state's attorney from an action for damages when he engages in racial discrimination in the exercise of his office.

The Court of Appeals held that a prosecutor is not cloaked with absolute immunity from suits for damages. When he acts outside of his jurisdiction or when he engages in duties analogous to that of policemen, such as the investigation of crimes, immunity does not apply. This decision is consistent with decisions of other circuits and with analogous decisions of this Court .

Because respondents seek long denied constitutional rights by demonstrating on the public ways against local public officials and merchants, they repeatedly are victims of assaults and batteries committed by white persons. Whether it be by reason of prejudice, neglect or otherwise, Berbling as the instrumentality of the state, who had knowledge of this criminal violence, made no effort to bring the guilty to punishment or afford protection or redress to the outraged and victimized. Berbling was unwilling to enforce state criminal laws when the victims were black persons and the accused were white persons. He consistently and repeatedly refused to take evidence of criminal conduct and turned a deaf ear to complaints of black persons; he refused to investigate their complaints; he refused to initiate criminal proceedings against their assailants; he refused to present appropriate evidence to the grand jury. The direct consequence of Berbling's policy was to deny respondents, because of their race, access to the criminal justice system for the resolution of grievances.

It is long established that when a public official acts outside of his quasi-judicial capacity, he is not immune from a claim for damages. Racial discrimination in the conduct

of an office is prohibited by the Constitution of the United States and the statutes of the State of Illinois. The exclusion of black persons and those actively supporting them from the benefits of the criminal justice system, because of their race, was not within Berbling's discretion. A state's attorney has a mandatory, non-discretionary and ministerial duty to exercise his office in a non-discriminatory manner. When he fails to so conduct his office, he acts outside his quasi-judicial capacity and is, therefore, personally liable for the consequences of his non-protected conduct. *See Ex parte Virginia,* 100 U. S. 339 (1880).

Additionally, the doctrine of quasi-judicial immunity does not extend to many of the duties of a state's attorney. Berbling is charged with refusing to take complaints from black persons, with refusing to investigate criminal conduct of whites against blacks, with refusing to present evidence of such criminal conduct to the grand jury, and with refusing to recommend bail and sentence without regard to race. In this respect his function is analogous to that of an investigator or policeman, and thus he is not immune from liability. When Berbling deprived respondents of access to the judicial system by his refusal to take evidence of white criminal conduct, he stood in no different a position than the prison warden who deprived a prisoner access to the courts. *See Johnson* v. *Avery,* 393 U. S. 483 (1969). When Berbling refused to gather evidence of white criminal conduct he stood in no different a position than the police officer who unlawfully carried out an investigation. *See Monroe* v. *Pape,* 365 U. S. 167 (1961).

The decision of the Seventh Circuit is consistent with decisions of other circuits. In *Lewis* v. *Brautigam,* 227 F. 2d 124 (5th Cir. 1955), the Fifth Circuit held that a state's attorney who ordered two deputy sheriffs to force the plaintiff to be photographed in convict garb at a state prison and to plead guilty could be liable for damages under Sec-

tions 1983 and 1985. In *Robichaud* v. *Ronan*, 351 F. 2d 533 (9th Cir. 1965), the Ninth Circuit held that a complaint stated a civil rights claim for damages against the prosecuting attorneys for prosecuting plaintiff on a murder charge with malicious motive and without probable cause. The complaint alleged that plaintiff had been arrested and confined for 25 days without a preliminary hearing. Efforts were made to extract a confession from him. The court stated:

> "Section 1983 . . . was intended to provide a remedy to persons subjected to '[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, . . .' [citing cases]. Thus, if immunities are broadly granted to state officers without consideration of the nature of their alleged misdeeds and the reason for the immunity, the statute becomes subject to circumvention, if not emasculation." *Id.* at 536.

In upholding the complaint, the court said:

> " '[P]rosecutors are not immune from suit under the Act simply as a matter of status wholly without regard to the nature of their conduct.' "
>
> • • • • •
>
> "The title of office, quasi-judicial or even judicial, does not, of itself, immunize the officer from responsibility for unlawful acts which cannot be said to constitute an integral part of judicial process." *Id.* at 537-38.

In *Hilliard* v. *Williams*, 465 F. 2d 1212 (6th Cir. 1972), *cert. denied*, ... U. S. ....., 93 S. Ct. 461 (1972), the Sixth Circuit held that deliberate suppression of favorable evidence by a prosecuting attorney in violation of plaintiff's constitutional rights was an act outside his quasi-judicial capacity and beyond the scope of "duties constituting an integral part of the judicial process". The Sixth Circuit reversed the district court's dismissal of plaintiff's com-

plaint, stating that a prosecuting attorney was not immune from liability in damages if plaintiff proved the allegations of her complaint.

Other cases which have held that a prosecuting attorney may be liable in damages under Sections 1983 and 1985 include *Johnson* v. *Crumlish*, 224 F. Supp. 22 (E. D. Pa. 1963), and *Madison* v. *Purdy*, 410 F. 2d 99 (5th Cir. 1969).

The cases cited by petitioner Berbling, although applying immunity to some factual situations, are distinguishable from the subject case in that they do not involve actions for damages arising out of racial discrimination.

This is not a case that demands, for policy reasons, protection of an officer who exercised his best judgment and abided his oath to uphold the Constitution. This is far from the type of case brought by a bitter defendant claiming that his civil rights were violated by a state's attorney's abuse of discretion in the course of litigation. Above all, this is not a case of intermittent and sporadic activity open to criticism but not to liability. The conduct charged was an official, determined and willful program of refusing to take evidence of white criminal conduct when the victims were black persons, to bring the guilty to punishment, and to afford equal protection and standing that no one has a right to impair. In *Bell* v. *Hood*, 327 U. S. 678, 684 (1946), this Court stated:

> "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."

III. The doctrine of quasi-judicial immunity does not apply to an investigator employed by a state's attorney.

Shepherd is an investigator who is employed by the Office of State's Attorney. He is not an assistant state's attorney nor is he a lawyer. His sole purpose is to investigate. His duties consist of interviewing witnesses, taking complaints and making investigations. The decision of the Seventh Circuit that Shepherd, as an investigator, is not entitled to immunity is consistent with decisions of this Court and courts of other circuits. His function is in the nature of a policeman-detective and as such he is not entitled to quasi-judicial immunity from damage actions. His sole defense is that of good faith, just as a policeman has a defense of good faith. Shepherd's failure to perform his affirmative, non-discriminatory duty to take evidence of criminal conduct of white persons against black victims constitutes both a willful and wanton omission in violation of the civil rights statutes and is a denial of equal protection of the laws. *See Monroe* v. *Pape*, 365 U. S. 167 (1961); *Griffin* v. *Breckenridge*, 403 U. S. 88 (1971); *Madison* v. *Purdy*, 410 F. 2d 99 (5th Cir. 1969).

IV. The amended complaint adequately states claims under the Civil Rights Act.

In finding that respondents' amended complaint states claims under the Civil Rights Act,[3] the Seventh Circuit followed established law that in appraising its sufficiency it must follow "the accepted rule that a complaint should not

3. The court thought that, in order to warrant the removal of the cloak of immunity from liability of Berbling and Shepherd for damages, the amended complaint might be more specific in alleging that the complained of conduct is outside quasi-judicial activity. The court, however, stated that that determination should be left to the district court and, if adverse to respondents, respondents should be permitted to amend their complaint.

be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitled him to relief." *Conley* v. *Gibson*, 355 U. S. 41, 45-46 (1957); *see also Lucarell* v. *McNair*, 453 F. 2d 836, 838 (6th Cir. 1972); *Scher* v. *Board of Educ. of West Orange*, 424 F. 2d 741, 744 (3rd Cir. 1970). Mere vagueness or lack of detail is not a ground for a motion to dismiss. Rule 8(f) of the Federal Rules of Civil Procedure provides that "all pleadings shall be so construed as to do substantial justice." If they thought the amended complaint were vague, petitioners could have availed themselves of Rule 12(e) and moved for a more definite statement. 2A Moore, Federal Practice, § 12.08. They did not so move.

This Court, as did the Seventh Circuit, must assume, on a motion to dismiss, that the allegations of the amended complaint are true and construe the allegations liberally, resolving any doubts in favor of the respondents. *See Boddie* v. *Connecticut*, 401 U. S. 371, 373 (1971); *Contract Buyers League* v. *F & F Investment*, 300 F. Supp. 210, 214 (N. D. Ill. 1969), *aff'd sub nom* 420 F. 2d 1191 (7th Cir. 1970), *cert. denied*, 400 U. S. 821 (1970); *Jung* v. *K. & D. Mining Co.*, 260 F. 2d 607, 608 (7th Cir. 1958).

CONCLUSION.

For the foregoing reasons, respondents urge the Court to deny the petitions for a writ of certiorari.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Illinois

EZELL LITTLETON, MANKER HARRIS, JAMES WILSON, CARL HAMPTON, HAZEL JAMES, WALTER GARRETT, CHARLES KOEN, FRANK WASHINGTON, CURTIS JOHNSON, CHERYL GARRETT, YVONDA TAYLOR, RUSSELL DEBERRY, ROBERT MARTIN, PRESTON EWING, JR., JAMES BROWN, HERMAN WHITFIELD, WALLACE WHITFIELD, LEROY LAMBERT, by his Father and Next Friend, HOBERT LAMBERT, MORRIS GARRETT, by his Father and Next Friend, LEVI GARRETT, individually and as representatives of a class,

Plaintiffs,

vs.

PEYTON BERBLING, individually and as State's Attorney for Alexander County, Illinois, EARL SHEPHERD, individually and as investigator for PEYTON BERBLING, CARL MEISENHEIMER, as Police Commissioner of the City of Cairo, Illinois, MICHAEL O'SHEA, as Magistrate of the Circuit Court for Alexander County, Illinois, and DOROTHY SPOMER, as Associate Circuit Judge for Alexander County, Illinois,

Defendants.

Civil Action No. 70-103

Equitable Relief Requested

AMENDED COMPLAINT.

Plaintiffs, Ezell Littleton, Manker Harris, James Wilson, Carl Hampton, Hazel James, Walter Garrett, Charles

Koen, Frank Washington, Curtis Johnson, Cheryl Garrett, Yvonda Taylor, Russell Deberry, Robert Martin, Preston Ewing, Jr., James Brown, Herman Whitfield, Wallace Whitfield, Leroy Lambert, by his father and next friend, Hobert Lambert, Morris Garrett, by his father and next friend, Levi Garrett, individually and as representatives of a class, by their attorneys, Martha Jenkins, James B. O'Shaughnessy and Alan M. Wiseman, complain of defendants, Peyton Berbling, individually and as State's Attorney for Alexander County, Illinois, Earl Sheperd, individually and as investigator for Peyton Berbling, Carl Meisenheimer, as Police Commissioner of the City of Cairo, Illinois, Michael O'Shea, as Magistrate of the Circuit Court for Alexander County, Illinois, and Dorothy Spomer, as Associate Circuit Judge for Alexander County, Illinois. Plaintiffs state as follows:

1. This is a civil-action under Title 42 U. S. C. Sections 1981, 1982, 1983, and 1985 for damages and for preliminary and permanent injunctions and other equitable relief, to enjoin the deprivation under color of law, custom and usage of Alexander County and the City of Cairo, Illinois, of plaintiffs and members of their class rights, privileges and immunities guaranteed by the First, Sixth, Eighth, Thirteenth and Fourteenth Amendments to the Constitution of the United States and by Title 42 U. S. C. Sections 1981, 1982, 1983, and 1985.

2. Jurisdiction is conferred on this Court by Title 28 U. S. C. Sections 1331 and 1343.

3(a) Plaintiffs are black citizens of the City of Cairo, Illinois, with the exception of plaintiffs Manker Harris and James Brown, who are white citizens of the City of Cairo, Illlinois.

(b) They bring this action as a class action, individually

and on behalf of all other persons similarly situated in the City of Cairo, Illinois.

(c) The class includes all those who, on account of their race or creed and because of their exercise of First Amendment rights, have in the past and continue to be subjected to the unconstitutional and selectively discriminatory enforcement and administration of criminal justice in Alexander County.

4(a) Plaintiffs are financially poor persons.

(b) They bring this action as a class action, individually and on behalf of all other persons similarily situated in the City of Cairo, Illinois.

(c) The class includes all those who, on account of their poverty, are unable to afford bail, or are unable to afford counsel and jury trials in city ordinance violation cases.

5. As to said classes of persons:

(a) They are so numerous that joinder of all members is impracticable; (b) there are questions of law and fact common to the class; (c) the claims of plaintiffs are typical of the claims of the class; (d) plaintiffs will fairly and adequately protect the interests of the class; and (e) defendants have acted and refuse to act on grounds generally applicable to the classes, thereby making appropriate final relief with respect to the class as a whole.

6(a) Defendant Berbling is, and was at all times mentioned herein, the State's Attorney for Alexander County, Illinois and a citizen and resident of that County.

(b) As State's Attorney he is the chief prosecuting attorney for said county.

(c) He has authority to determine when criminal complaints may be filed and warrants issued, whether and how

to prosecute violations of state statutes, what the charges should be against accused persons, and also to recommend dismissals and reductions of charges, length of sentences, and the terms thereof.

(d) On information and belief defendant Berbling may also recommend the amount of bond and whether a convicted defendant should pay costs.

7. Defendant Meisenheimer is, and was at all times mentioned herein, a Police Commissioner of the City of Cairo, and a citizen of the City of Cairo, Illinois. As such he supervises the activities of the Cairo Police Department.

8(a) Defendant O'Shea is, and was at all times mentioned herein, the Magistrate for the Circuit Court of Alexander County, Illinois and a citizen of that County. As such, he has the authority to set bond for all persons charged with crime either under state law or city ordinance. He also has the authority to handle preliminary hearings, trials of ordinance violations and misdemeanors. In each of such cases, he determines the outcome and, in the case of ordinances and misdemeanors, the sentence to be imposed.

(b) Defendant Spomer is, and was at all times mentioned herein, the Associate Circuit Judge for Alexander County, Illinois, and a citizen of that county. As such, she has the authority to act in all criminal matters in Alexander County.

9. Defendant Earl Shepherd, is, and was at all times mentioned herein, employed by the Office of the State's Attorney as an investigator and assistant to defendant Berbling, and a citizen of Alexander County, Illinois.

FIRST CLAIM FOR RELIEF.

10. Since the early 1960's black citizens of Cairo, Illinois, together with a small number of white persons on their behalf, have been actively, peaceably and lawfully seeking equality of opportunity and treatment in employment, housing, education, participation in governmental decision making and in ordinary day-to-day relations with white citizens and officials of Cairo. As an important part of their protest, plaintiffs have participated in and encouraged others to participate in an economic boycott of merchants of the City of Cairo who plaintiffs consider have engaged in racial discrimination.

11. This active and lawful seeking after long overdue constitutional rights has generated and continues to generate a great deal of tension and antagonism from the white citizens and officials of Cairo.

12. As is hereinafter set forth more fully, defendant Berbling has engaged in, and continues to engage in, a pattern and practice of conduct under color of law, custom and usage of Alexander County, Illinois, in the administration of criminal justice in said county, which has deprived and continues to deprive plaintiffs and members of their class of their rights to due process of law and the equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States and the right to be free from the vestiges of slavery as secured by the Thirteenth Amendment and of rights secured by laws of the United States, *viz.*, Sections 1981, 1982 and 1983 of Title 42, United States Code.

13. Defendant Berbling, with a purpose of depriving plaintiffs of equal protection of the laws or equal privileges and immunities under the law, with a purposeful intent to discriminate upon the basis of race and creed, under color

of state law and authority, deprives plaintiffs of rights and privileges as citizens of the United States by neglecting to provide for their personal safety, although knowing of the possibility of racial disorders, by refusing to prosecute those who threaten plaintiffs' safety and property and by refusing to permit plaintiffs to give evidence against white persons respecting acts threatening their personal safety and property, with the design to intimidate plaintiffs so as to chill their exercise of the First Amendment right to assemble peaceably and their right to hold property to the same extent as is enjoyed by white citizens.

14. Defendant Berbling has denied and continues to deny to plaintiffs and members of their classes as described in paragraphs 3 and 4 herein of their constitutional rights in the following ways:

(a) It has been and continues to be the practice of defendant to refuse to initiate criminal proceedings and to refuse to hear criminal charges against members of the white race upon the complaints of members of the plaintiffs' class and to deprive plaintiffs of their right to give evidence affecting their security, for example:

(1) On March 28, 1969, defendant refused to permit James Wilson to file criminal charges against Charlie Sullivan, a white man, who pointed a gun at him as he (Wilson) attempted to move into the house next door to Charlie Sullivan on 22nd Street, in Cairo, Illinois. Sullivan threatened Wilson with the gun and told him to move the truck containing household furnishings and leave the area, thereby attempting to prevent James Wilson from holding property.

(2) On or about March 29, 1969, defendant refused to permit James Wilson to file criminal

charges against Charlie Sullivan who fired shots from a gun around James Wilson's home to intimidate his family in order to prevent James Wilson from holding property.

(3) In January, 1970, defendant refused to permit Robert Martin to file charges against Charlie Sullivan, who tried to run him down in a truck while peacefully marching in exercise of his First Amendment rights.

(4) In June, 1970, defendant refused to permit Ezell Littleton to file charges against a white man who without cause or justification assaulted and battered him.

(5) In June, 1970, defendant refused to permit Rev. Manker Harris to file charges against two white policemen of the City of Cairo for attempted murder and/or malicious prosecution.

(6) On August 10, 1970, defendant Berbling, through a subordinate, defendant Earl Shepherd, refused to permit plaintiff Hazel James to file criminal charges against Raymond Hurst, a white man, who had kicked plaintiff James in the stomach while she was peacefully demonstrating against the racially discriminatory practices of merchants and of public officials of the City of Cairo.

(7) In May, 1969, plaintiff Ewing and eight others could have and desired to bring criminal charges against a white man who threatened them with a shotgun, but did not because they knew of defendant's practice of refusing to take complaints and were discouraged from making useless gestures.

(b) It has been and continues to be the practice of defendant Berbling in those instances where complaints

have been filed by black persons against white persons involving misdemeanors to submit such to a grand jury, rather than proceed by information or complaint, and to interrogate complainants and witnesses before the grand jury with a purposeful intent to discriminate upon the basis of race and creed, thereby depriving plaintiffs and members of their class of their right to give evidence affecting their security and thereby chill their exercise of their right to assemble peaceably, for example: Morris Garrett (a 13 year old boy), on August 8, 1970, during a demonstration against the racially discriminatory practices of merchants and public officials of the City of Cairo, was struck by one Tom Madra. A complaint was filed which was presented to the grand jury. Morris Garrett appeared before the grand jury. Defendant Berbling, rather than question him regarding the incident, asked him such questions as "did you get paid for picketing?" A no-true bill was returned by the grand jury.

(c) It has been and continues to be the practice of defendant Berbling, in those instances where complaints have been filed by black persons against white persons involving misdemeanors, to submit such to a grand jury, rather than proceed by information or complaint, and, in some instances, fail to interrogate at all the complainant and witnesses respecting the incident, purposefully intending to discriminate upon the basis of race and creed, thereby depriving plaintiffs and members of their class of their right to give evidence affecting their security and thereby chill their exercise of their right to assemble peaceably, for example:

(1) On August 13, 1970, Cheryl Garrett and Yvonda Taylor, ages 18 and 16 respectively, were shot at by one Jack Guetterman, Jr. Rev. Walter

Garrett and Ezell Littleton, following a telephone call from the young girls, went to the scene of the shooting. Shortly thereafter police officers arrived. While Rev. Walter Garrett was discussing the situation with one police officer, one Jack Guetterman, Sr. struck Rev. Garrett in the face, causing him to fall to the ground. A complaint was filed by Rev. Walter Garrett respecting this incident. Defendant Berbling presented the complaint to the grand jury, but Rev. Garrett was not interrogated at all respecting the incident. Ezell Littleton, who witnessed the assault, was not called to testify.

(2) On or about August 8, 1970, Curtis Johnson was struck by one Al Moss while demonstrating against the racially discriminatory practices of merchants and public officials of the City of Cairo. A complaint was filed, which was presented to the grand jury. Curtis Johnson, however, was not interrogated by defendant Berbling respecting the incident.

(d) It has been and continues to be the practice of defendant Berbling in the few criminal proceedings he has instituted against white persons at the behest of plaintiffs to inadequately prosecute the cases in order to lose or to settle them on terms more favorable than those against blacks;

(e) It has been and continues to be the practice of defendant Berbling to request or recommend, in cases involving plaintiffs and members of their class, substantially greater bonds and sentences than requested or recommended in cases involving white persons;

(f) It has been and continues to be the practice of defendant Berbling to charge plaintiffs and members of

their class with significantly more serious charges for conduct which would result in no charge or a minor charge against a white person.

(g) Defendant Berbling has sought to deprive plaintiffs of their right to give evidence respecting the security of members of their class by seeking the dropping of a criminal charge arising out of a complaint filed by Frank Hollis, a black person, against Tom Madra, a white person, in return for which defendant would drop pending criminal charges against several of the plaintiffs.

15. Each of said practices is carried out wilfully and maliciously with intent to deprive plaintiffs and members of their class of the benefits of the criminal justice system of Alexander County and to deprive plaintiffs and members of their class of the right to give evidence against those who threaten their security, peace, and tranquility and the right to hold property as enjoyed by white citizens.

16. Each of said practices is carried out wilfully and maliciously with intent to deter plaintiffs and members of their class from engaging in a peaceful boycott and other activities protected by the First Amendment to the Constitution of the United States.

17. Each of said practices is carried out in violation of the rights of plaintiffs and their class under the First, Thirteenth and Fourteenth Amendments to the Constitution of the United States and of rights secured by laws of the United States, viz., Sections 1981, 1982 and 1983 of Title 42, United States Code.

18. Plaintiffs and their class have no adequate remedy at law for the deprivation of their constitutional rights by defendant as hereinabove set forth. Unless this Court issues an injunction as prayed for, plaintiffs and the plaintiff classes will suffer irreparable harm.

WHEREFORE, plaintiffs respectfully pray that:

1. Defendant be preliminarily and permanently enjoined from depriving plaintiffs and members of the plaintiff class of their constitutional rights in the manner set forth in paragraphs 13 and 14 of this complaint, and that defendant be required to submit a monthly report to this Court concerning the nature, status and disposition of any complaint brought to him by plaintiffs or members of their class, or by white persons against plaintiffs or members of their class.

2. Defendant be preliminarily and permanently enjoined from neglecting his duties of office in failing to interrogate impartially and without discrimination witnesses before the grand jury.

3. Defendant be preliminarily and permanently enjoined from requesting more severe bond and sentences for plaintiffs and members of their class than for white persons;

4. Defendant be preliminarily and permanently enjoined from setting more severe charges against plaintiffs and members of their class than for white persons;

5. This Court maintain continuing jurisdiction in this action;

6. Grant to plaintiffs their costs and reasonable attorneys' fees; and

7. Grant such other relief as to the Court may seem just and proper.

SECOND CLAIM FOR RELIEF.

19. Plaintiffs reallege the allegations of paragraphs 1-3, 5-6 and 10-17.

20. Each of the named plaintiffs suffered humiliation, despair, frustration, great anxiety, and physical distress as a result of the practices of defendant alleged in paragraphs

12-14, and in particular by defendant's refusal to permit plaintiffs to initiate criminal proceedings, to give evidence, and to benefit from laws protecting their security to the same extent as white citizens.

WHEREFORE, plaintiffs respectfully pray that:

1. This Court grant to each of them damages in the amount of $1,000 as compensatory damages and $1,500 as punitive damages.

2. This Court award plaintiffs their costs and reasonable attorneys fees; and

3. This court grant such other rellief as may be just and proper.

THIRD CLAIM FOR RELIEF.

21. Plaintiffs reallege the allegations of paragraphs 1-3, 5-6, 9-13 and 15-16.

22. Defendant Berbling in conspiracy with defendant Shepherd, with a purpose of depriving plaintiffs of equal protection of the laws or equal privileges and immunities under the law, with a purposeful intent to discriminate upon the basis of race and creed, under color of state law and authority, deprived plaintiffs of rights and privileges as citizens of the United States, as follows:

(a) Defendants Berbling and Shepherd have conspired to deprive plaintiffs of equal protection of the laws by neglecting to provide for their personal safety, because of their race, although knowing of the possibility of racial disorders, by refusing to prosecute those who threaten plaintiffs' safety.

(b) Defendants Berbling and Shepherd have conspired to prevent plaintiffs from giving evidence against white persons respecting acts threatening their personal safety with the design to intimidate plaintiffs so as to chill their exercise of the First Amendment

right to assemble peaceably. For example, on Saturday, August 8, 1970, plaintiff Hazel James was peacefully demonstrating against the racially discriminatory practices of merchants and public officials of the City of Cairo pursuant to a boycott when she was kicked in the stomach by one Raymond Hurst. Plaintiff James was rushed to a hospital for treatment of the injury sustained. On Monday, August 10, 1970, plaintiff James sought to file a complaint, but defendant Shepherd, at defendant Berbling's directions, refused to allow it.

23. Such practices are carried out in violation of the rights of plaintiffs and their class under the First, Thirteenth and Fourteenth Amendments to the Constitution of the United States and of rights secured by laws of the United States, *viz.*, Sections 1981, 1982, 1983 and 1985 of Title 42, United States Code.

WHEREFORE, plaintiffs respectfully pray that:

1. This Court grant to each of them damages in the amount of $1,000 as compensatory damages and $1,500 as punitive damages.

2. This Court award plaintiffs their costs and reasonable attorneys fees; and

3. This Court grant such other relief as may be just and proper.

FOURTH CLAIM FOR RELIEF.

24. Plaintiffs reallege the allegations of paragraphs 1-3, 5, 9-11, 15-17 and 20.

25. Defendant Shepherd has engaged in, and continues to engage in, a pattern and practice of conduct under color of law, custom and usage of Alexander County, Illinois, which has deprived and continues to deprive plaintiffs and

members of their class of their rights to due process of law and the equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States and of rights secured by laws of the United States, *viz.*, Sections 1981, 1982 and 1983 of Title 42, United States Code.

26. Defendant Shepherd, with a purpose of depriving plaintiffs of equal protection of the laws or equal privileges and immunities under the law, with a purposeful intent to discriminate upon the basis of race and creed, under color of state law and authority, deprives plaintiffs of rights and privileges as citizens of the United States by refusing to permit plaintiffs to give evidence against white persons respecting acts threatening their personal safety, with the design to intimidate plaintiffs so as to chill their exercise of the First Amendment right to assemble peaceably; for example:

On August 18, 1970, defendant Shepherd refused to permit plaintiff Hazel James to file criminal charges against one Raymond Hurst, a white man, who, on August 8, 1970, had kicked plaintiff James in the stomach while she was peacefully demonstrating against the racially discriminatory practices of merchants and public officials of the City of Cairo.

WHEREFORE, plaintiffs respectfully pray that:

1. This Court grant to each of them damages in the amount of $1,000 as compensatory damages and $1,500 as punitive damages.

2. This Court award plaintiffs their costs and reasonable attorneys fees; and

3. This Court grant such other relief as may be just and proper.

FIFTH CLAIM FOR RELIEF.

27. Plaintiffs reallege the allegations in paragraphs 1-3, 5, 7 and 10-11.

28. As hereinafter set forth more fully, defendant Meisenheimer has engaged in, and continues to engage in, a pattern and practice of conduct, under color of law, custom and usage of the City of Cairo, Illinois, in the enforcement of criminal justice in said city, all of which has deprived and continues to deprive plaintiffs and members of their class of their rights to due process of law and to equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States and of rights secured by laws of the United States, *viz.*, Sections 1981, 1982, 1983, 1985 and 1986, Title 42, United States Code.

29. Defendant Meisenheimer has denied and continues to deny to plaintiffs and members of their class their constitutional rights in the following ways:

(a) Defendant has made or caused to be made or cooperated in the making of arrests and the filing of charges against plaintiffs and members of their class where such charges are not warranted and are merely for the purpose of harrassment and to discourage and prevent plaintiffs and their class from exercising their constitutional rights.

(b) Defendant has made or caused to be made or cooperated in the making of arrests and the filing of charges against plaintiffs and members of their class where there may be some colorable basis to the arrest or charge, but the crime defined in the charge is much harsher than is warranted by the facts and is far more severe than like charges would be against a white person.

30. Each of said practices is carried out with intent to deprive plaintiffs and members of their class of the benefits of the criminal justice system of Alexander County.

31. Each of said practices is carried out with intent to deter plaintiffs and members of their class from engaging in a peaceful boycott and other activities protected by the First Amendment to the Constitution of the United States.

32. Each of said practices is carried out in violation of the rights of plaintiffs and their class under the First, Thirteenth and Fourteenth Amendments to the Constitution of the United States.

33. Plaintiffs and their class have no adequate remedy at law for the deprivation of their constitutional rights by defendants as herein set forth. Unless this Court issues an injunction as prayed for, plaintiffs and the plaintiff class will suffer irreparable harm.

WHEREFORE, plaintiffs respectfully pray that:

1. Defendant be preliminarily and permanently enjoined from depriving plaintiffs and members of the plaintiff class of their constiutional rights in the manner set forth in paragraph 29 of this complaint, and that defendants be required to submit a monthly report to this Court concerning the nature, status and details of each arrest of and each charge filed against plaintiffs or members of plaintiff class in which the Police Department of the City of Cairo was involved in any way;

2. This Court maintain continuing jurisdiction in this action;

3. Grant to plaintiffs their costs and reasonable attorneys fees; and

4. Grant such other relief as to the Court may seem just and proper.

SIXTH CLAIM FOR RELIEF.

34. Plaintiffs reallege the allegations in paragraphs 1-5 and 8 and 10-11.

35. As hereinafter set forth more fully, defendants O'Shea and Spomer have engaged in and continue to engage in, a pattern and practice of conduct, under color of law, custom and usage of Alexander County, Illinois, in the administration of criminal justice in said county, all of which has deprived and continues to deprive plaintiffs and members of their class of their rights to due process of law and to the equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States.

36. Defendants O'Shea and Spomer have denied and continue to deny to plaintiffs and members of their class their constitutional rights in the following ways:

(a) They set bond in criminal cases without regard to the Constitution and statutes of the State of Illinois requiring that bond be merely an assurance that defendant will appear in court when required, not that it be a punishment, in that they follow an unofficial bond schedule without regard to the facts of a case or circumstances of an individual defendant, all in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

(b) On information and belief they set sentences higher for plaintiffs and members of plaintiffs' class than for white persons and impose harsher conditions.

(c) It is the custom and practice of defendants O'Shea and Spomer to require plaintiffs and members of their class when charged with violations of city ordinances which carry fines and possible jail penalties if the fine cannot be paid, to pay for a trial by jury, all in violation of their rights under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

37. Each of said practices is carried out with intent to deprive plaintiffs and members of their class of the benefits of the criminal justice system of Alexander County.

38. Each of said practices is carried out with intent to deter plaintiffs and members of their class from engaging in a peaceful boycott and other activities protected by the First Amendment to the Constitution of the United States.

39. Each of said practices is carried out in violation of the rights of plaintiffs and their class under the First, Thirteenth and Fourteenth Amendments to the Constitution of the United States.

40. Plaintiffs and their class have no adequate remedy at law for the deprivation of their constitutional rights by defendants as herein set forth. Unless this Court issues an injunction as prayed for, plaintiffs and the plaintiff class will suffer irreparable harm.

WHEREFORE, plaintiffs respectfully pray that:

1. Defendants be preliminarily and permanently enjoined from depriving plaintiffs and members of their class of their constitutional rights in the manner set forth in paragraph 36.

2. Grant to plaintiffs their costs and attorneys fees herein; and

3. Grant such other and further relief as to the Court may seem just and proper.

Respectfully submitted,

/s/ JAMES B. O'SHAUGHNESSY,
James B. O'Shaughnessy,

/s/ ALAN M. WISEMAN,
Alan M. Wiseman.

SCHIFF HARDIN WAITE
DORSCHEL & BRITTON,
231 S. LaSalle Street,
Chicago, Illinois 60604,
CEntral 6-4500.

APPENDIX B.

U. S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U. S. Const. amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

U. S. Const. amend. XIII:

> SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

U. S. Const. amend XIV:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> • • • • •
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 U. S. C. § 1343:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> • • • • •
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U. S. C. § 1981:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white persons, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U. S. C. § 1982:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U. S. C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at lawsuit in equity, or other proper proceeding for redress.

42 U. S. C. § 1985:

§ 1985(2) ". . . or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) If two or more persons in any State or Territory conspire or go in disguise on the highways or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

Ill. Const., Art. 1, § 13:

The right of trial by jury as heretofore enjoyed shall remain inviolate.

Ill. Rev. Stat., ch. 14 § 1:

Before entering upon the respective duties of their office, the attorney general and state's attorneys shall each be commissioned by the governor, and shall take the following oath or affirmation:

I do solemnly swear (or affirm, as the case may be), that I will support the Constitution of the United States and the Constitution of the state of Illinois, and that I will faithfully discharge the duties of the office of attorney general (or state's attorney, as the case may be), according to the best of my ability.

Ill. Rev. Stat., ch. 37 § 72.2:

> **. . . The several judges of the circuit courts of this State, before entering upon the duties of their office, shall take and subscribe the following oath or affirmation, which shall be filed in the office of the Secretary of State:**
>
> **I do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States, and the Constitution of the State of Illinois, and that I will faithfully discharge the duties of judge of ..... court, according to the best of my ability.**

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No 72-953

MICHAEL O'SHEA and DOROTHY SPOMER, *Petitioners,*

vs.

EZELL LITTLETON, et al., *Respondents.*

No. 72-955

W. C. SPOMER, *Petitioner,*

vs.

EZELL LITTLETON, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF EVELLE J. YOUNGER ATTORNEY GENERAL OF THE STATE OF CALIFORNIA AMICUS CURIAE

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INTEREST OF THE AMICUS CURIAE

The opinion of the court below, extending the jurisdiction of the federal district courts over the day to day operations of a county prosecutor's office and limiting his traditional immunity from suits brought

under the Civil Rights Act, has implications that reach far beyond the borders of Alexander County, Illinois. As it presently stands, the decision of the Seventh Circuit portends the extension of federal supervision over every county prosecutor in every State of the Union.

Under article V, section 13 of the California Constitution, the Attorney General is charged with direct supervision over every district attorney and sheriff and the duty to see that state law is uniformly and adequately enforced in each of California's 58 counties. This state constitutional mandate necessarily requires him to resist the creation of precedent which would displace his supervisory powers with those of the federal courts. Also, once the federal courts have assumed supervisory powers over a county prosecutor's office, it would not be a long step for them to assume supervisory powers over a state attorney general's office as well. The interest of the California Attorney General in adequate and effective local law enforcement and in preserving his own supervisory powers thus brings him before this Honorable Court as amicus curiae.

SUMMARY OF ARGUMENT

Like judicial immunity, prosecutorial immunity is essential for the proper administration of justice. An injunction suit can be as disruptive as an action for damages, and its potential for abuse, coupled with the ease with which a claim can be pleaded and discovery

obtained, require that the prosecutor's traditional immunity from both types of suits be retained. Even the threat of such suits could improperly curtail a prosecutor's exercise of discretion.

In any event, if the federal courts undertake to exercise supervision over local prosecutors, the well established doctrines of federalism and comity require that they abstain from doing so until state supervising authorities have had a fair opportunity to act.

ARGUMENT

I

THE TRADITIONAL RULE THAT PROSECUTORS AS QUASI-JUDICIAL OFFICERS ARE IMMUNE FROM SUIT UNDER THE FEDERAL CIVIL RIGHTS ACT, INCLUDES IMMUNITY FROM INJUNCTIVE RELIEF AS WELL AS ACTIONS FOR DAMAGES

In *Pierson v. Ray*, 386 U.S. 547 (1967), this Court, describing the doctrine of judicial immunity as "solidly established at common law" (*id.* at 553-554) held that a judge may not be held liable in a damage action brought under the Civil Rights Act (42 U.S.C. §1983) for acts committed within his judicial jurisdiction. This immunity attaches without regard for the personal motives with which the judge may have acted. The Court had previously recognized legislative immunity in *Tenney v. Brandhove*, 341 U.S. 367 (1951).

The basic policy behind immunity was explained by the Court as follows:

> "It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.
>
> "We do not believe that this settled principle of law was abolished by § 1983, which makes liable 'every person' who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities." 386 U.S. at 554-555.

Almost reluctantly, and under the compulsion of this Court's decision in *Pierson v. Ray, supra,* the Seventh Circuit held that a county prosecutor is immune from an action for damages brought under the Civil Rights Act (42 U.S.C. § 1983), but went on to hold that a district court may issue an injunction to control the day to day functioning of a prosecutor's office.

That a prosecutor's decision-making function is sufficiently similar to that of a judge to make applicable the doctrine of judicial immunity was recognized by the Seventh Circuit, "[T]he immunity, often characterized as 'quasi-judicial,' cloaking the prosecuting attorneys is, of necessity, derivative from

concepts developed in connection with the judiciary. . . ." 468 F.2d at 408-409.

The reasons why the prosecutor, nominally an executive officer, shares in an immunity conferred on the judicial branch, were concisely summarized in *Bauers v. Heisel,* 361 F.2d 581 (3d Cir. 1966) as follows:

> "In deciding the question of whether a prosecuting attorney is liable for acts done in his official capacity, we must decide whether his duties are sufficiently judicial as to cloak him with the same immunity afforded judges or are so closely related to those duties of law enforcement officials as to amerce him with potential civil liability for his imprudent actions. [Citation omitted]. Analogy could support either conclusion, but we believe that both reason and precedent require that a prosecuting attorney should be granted the same immunity as is afforded members of the judiciary. The reasons are clear: his primary responsibility is essentially judicial—the prosecution of the guilty and the protection of the innocent, [citation omitted]: his office is vested with a vast quantum of discretion which is necessary for the vindication of the public interest. In this respect, it is imperative that he enjoy the same freedom and independence of action as that which is accorded members of the bench. [Footnote omitted]. This reasoning is nearly as well established in Anglo-American law as judicial immunity itself." *Id.* at 589-590.

Since, as this Court has thrice noted, immunity is afforded a public official not for his own good but for

the good of the public (*Pierson v. Ray, supra,* 386 U.S. at 554; *Tenney v. Brandhove, supra,* 341 U.S. at 377; *Bradley v. Fisher,* 13 Wall. 335, 349 [1871]), it is the public interest which must ultimately determine whether a prosecutor's decision making function is subject to the injunctive power of the federal courts.[1]

This case comes before the Court in a factual setting involving confrontations between white citizens and black citizens in a small rural community, from the plaintiff's point of view, about as appealing a set of facts as could be conceived. However, once the federal courts begin to exercise supervisory jurisdiction over state prosecutors, it will prove impossible to confine that jurisdiction to cases involving alleged racial discrimination. As pointed out by the National District Attorney's Association in their petition for certiorari (pp. 18-19), the assumption that such suits if allowed would be seldom filed simply flies in the face of reality. There are any number of special interest groups[2] who would jump at the chance to

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[1]To be distinguished are cases brought under section 1983 to enjoin a state court prosecution in which the district attorney is named as defendant, *e.g., Mitchum v. Foster,* 407 U.S. 225 (1972); *Younger v. Harris,* 401 U.S. 37 (1971). These cases, directed against the enforcement of specific statutes alleged to be unconstitutional on their face or as applied, in no way involve the prosecutor's exercise of discretion. In such cases the prosecutor is simply a nominal defendant, present in the case because a state or municipality is not a "person" within the meaning of section 1983. *Monroe v. Pape,* 365 U.S. 167 (1961); see also *Moor v. County of Alameda,* 41 U.S.L.W. 4627 (May 14, 1973). Here there is no attack on the constitutionality of the state statutes under which the prosecuting attorney is proceeding.

[2]The use of the term "special interest group" is not here intended as pejorative, but merely descriptive.

litigate in a federal court the question of whether a district attorney is prosecuting a class of cases with which they are concerned with either excessive or insufficient vigor. We know from experience in the Office of the California Attorney General, that the most bitter, personally vindictive and hard fought political battles occur not at the national or state level but at the county level, and more often than not feature allegations of district attorney incompetence, malice and even corruption. Clearly these conflicts should not be transferred to the federal courts.[3]

Our concern in supporting the argument for total immunity is not so much for the time of the federal court required to hear the case as it is for the disruptive impact of such litigation on a local prosecutor's office if the doctrine of quasi-judicial immunity is in any way abridged. Given the presence of a state officer subject to suit, it is relatively easy under modern federal pleading rules to state a cause of action under the Civil Rights Act. Indeed, this very Court in *Haines v. Kerner,* 404 U.S. 519 (1972), held that a motion to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure should only be granted in a Civil Rights case when it appears beyond doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief.

The Seventh Circuit almost naively assumes that at worst the recognition of a cause of action would

[3]*Cf.* "In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies." *Tenney v. Brandhove, supra,* 341 U.S. at 378.

require no more than that the district attorney periodically file with the court a report of his performance. 468 F.2d at 414-415. What it entirely overlooks is the impact on a local prosecutor of the broad discovery tools available to any plaintiff once the complaint has survived a motion to dismiss under Rule 12(b). "[T]he filing of a complaint pursuant to § 1983 in federal court initiates an original plenary civil action, governed by the full panoply of the Federal Rules of Civil Procedure . . . such a proceeding, with its discovery rules and other procedural formalities, can take a significant amount of time. . . ." *Preiser v. Rodriguez,* 41 U.S.L.W. 4555, 4561 (May 7, 1973). The district attorney, his assistants and investigators can be required to give depositions and answer lengthy and complex interrogatories, thus bringing their important prosecutorial functions to a standstill. Even more ominously, the files of a district attorney, previously assumed to be confidential, can be opened to potential criminal defendants. Indeed, it is not inconceivable that an astute criminal defendant could use the vehicle of an easily pleaded civil rights action to obtain access to materials not otherwise discoverable under state law.

In the conclusion of its opinion, Seventh Circuit claims that it has done no more than recognize a federal cause of action, assuming that this would impose no real burden on the defendants. What the Seventh Circuit appears to have overlooked is that curtailment of the prosecutor's immunity gives any disgruntled individual or group the opportunity vir-

tually to hamstring local law enforcement during the discovery phases of a civil rights case without regard to the factual merits of their claim. Thus the very pendency of a federal injunction action against a local prosecutor can have a drastic impact on his office in terms of time, diversion of resources and disclosure of confidential material even if the complaint ultimately proves groundless.

Moreover, even if the hopes of the Seventh Circuit come true, and such suits are seldom filed, the fact that such suits *could* be filed would have a "chilling effect" on the prosecutor's exercise of discretion. The decision whether or not to prosecute a given criminal offense is a delicate and sometimes difficult one in which considerations of the defendant's guilt and the prospects of obtaining a conviction or plea of guilty are only preliminary. See *Kaplan,* The Prosecutorial Discretion—A Comment, 60 Nw. L. Rev. 174 (1965). Injecting into the decision making equation, the threat of a federal lawsuit and its attendant disruption of his office, could well tip the balance in favor of prosecution in some cases where the prosecutor was uncertain of the defendant's guilt or less than confident of obtaining a conviction. (Significantly, in the present case, it is *not* alleged that the prosecutor refused to act even though he knew a conviction could be obtained.) To commence a prosecution without a reasonable hope of conviction has been described by this Court as "bad faith" conduct. *Younger v. Harris, supra,* 401 U.S. 37, 47-49 (1971); *Dombrowski v. Pfister,* 380 U.S. 479, 490 (1965).

It is no answer to say, as does the Seventh Circuit, that the federal courts, in entertaining such cases, are simply vindicating the public interest in "even-handed and nondiscriminatory enforcement of the laws." 468 F.2d at 413. The problem is that a private party or special interest group may have an individualized view of the public interest, or of nondiscriminatory law enforcement, poles part from the real thing. Indeed if the public interest could truly be objectivised, there would be no need for prosecutorial discretion at all. But the very recognition of the necessity that discretion be vested in prosecutors *(Bauers v. Heisel, supra,* 361 F.2d 581, 590) necessarily refutes that assumption. Having been given discretion, a prosecutor ought not be required to exercise it under fear of a federal lawsuit.[4] We respect-

[4]The American Bar Association Project on Standards for Criminal Justice in its standards relating to the Prosecution Function, approved draft 1971, contains the following: "(2.1) Prosecution authority should be vested in a public official. The prosecution function should be performed by a public prosecutor who is a lawyer subject to the standards of professional conduct and discipline. (3.4) Decision to charge. (a) The decision to institute criminal proceedings should be initially and primarily the responsibility of the prosecutor. (b) The prosecutor should establish standards and procedures for evaluating complaints to determine whether criminal proceedings should be instituted. (c) Where the law permits a citizen to complain directly to a judicial officer or the grand jury, the citizen complainant should be required to present his complaint for prior approval to the prosecutor and the prosecutor's action or recommendation thereon should be communicated to the judicial officer or grand jury." (pp. 49, 83.)

The Commentary to these standards states in part: "The concept that the state has a special interest in the prosecution of criminal cases which requires the presence of a professionally trained advocate arose during the formative period of American law. Earlier, in England, it had been assumed that prosecution was a matter for the victim, his family or friends. See Schwartz, CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY AND THE ADMINISTRATION

fully submit that the compelling public interest in the effective law enforcement at the county level requires no less than that the absolute immunity doctrine be retained in its entirety.

II

ASSUMING THAT A CAUSE OF ACTION MAY BE STATED FOR INJUNCTIVE RELIEF, THE FEDERAL COURTS OUGHT TO ABSTAIN FROM SUPERVISING THE OPERATIONS OF THE COUNTY PROSECUTOR'S OFFICE UNTIL STATE REMEDIES HAVE BEEN EXHAUSTED OR PROVEN INEFFECTIVE

California constitutional and statutory law places local district attorneys under the supervision of the state attorney general. Thus, article V, section 13 of the Califorina Constitution provides as follows:

> "Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State. It shall be his duty to see that the laws of the State are uniformly and adequately enforced. He shall have direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices, and may require any of said officers to make to him such reports concerning the investigation,

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OF CRIMINAL JUSTICE 4-5 (1962). The idea that the criminal law, unlike other branches of the law such as contract and property, is designed to vindicate public rather than private interests is now firmly established. The participation of a responsible public officer in the decision to prosecute and in the prosecution of charge gives greater assurance that the rights of the accused will be respected than is the case when the victim controls the process.

"Whatever may have been feasible under conditions of the past, modern conditions require that the authority to commence criminal proceedings be vested in a professional, trained, responsible public official." (pp. 49, 84.)

> detection, prosecution, and punishment of crime in their respective jurisdictions as to him may seem advisable. Whenever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law of which the superior court shall have jurisdiction, and in such cases he shall have all the powers of a district attorney. When required by the public interest or directed by the Governor, he shall assist any district attorney in the discharge of his duties."

Pursuant to this provision, the California Legislature enacted section 12550 of the Government Code which provides:

> "The Attorney General has direct supervision over the district attorneys of the several counties of the State and may require of them written reports as to the condition of public business entrusted to their charge.
>
> "When he deems it advisable or necessary in the public interest, or when directed to do so by the Governor, he shall assist any district attorney in the discharge of his duties, and may, where he deems it necessary, take full charge of any investigation or prosecution of violations of law of which the superior court has jurisdiction. In this respect he has all the powers of a district attorney, including the power to issue or cause to be issued subpenas or other process."

Thus, even though California law does not authorize a private party or a court on its own motion to institute criminal proceedings *(People v. Municipal Court,* 27 Cal.App.3d 193, 103 Cal.Rptr. 645 [1972]),

any person or group of persons who feel that a district attorney is not properly enforcing the law may bring the matter to the attention of the Attorney General, who has the power and indeed the duty to intervene in the local situation if the facts require such action.

Accordingly, should this Court hold that federal courts may under the provision of the Civil Rights Act exercise supervisory powers over a district attorney's office, it should also formulate an abstention doctrine analogous to that enunciated recently in *Younger v. Harris,* 401 U.S. 37 (1971). In that case, this Court held that the fundamental doctrines of comity and federalism require that a federal court not issue an injunction to restrain a state criminal prosecution brought in good faith. The doctrines of comity and federalism were explained by this Court as follows:

> "The precise reasons for this longstanding public policy against federal court interference with state court proceedings have never been specifically identified but the primary sources of the policy are plain. One is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. The doctrine may originally have grown out of circumstances peculiar to the English judicial system and not applicable in this country, but its fundamental purpose of restraining equity jurisdiction within narrow limits is equally important under our Constitution, in order to prevent

erosion of the role of the jury and avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted. This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism.' The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important

place in our Nation's history and its future." 401 U.S. 43-45.

Federal interference with a state prosecutor's decision whether or not to prosecute any number of state law violations committed by any number of potential defendants is at the very least as disruptive as the issuance of an injunction to restrain a single criminal prosecution. Consequently, where under its own law a state has provided a remedy for prosecutor misfeasance or malfeasance in office, considerations of federalism and comity require that the federal court abstain from exercising its jurisdiction until those remedies have at least been tried. Thus, it is oversimplistic to say, as did the Seventh Circuit, that there is no requirement for exhaustion of state legal or political remedies in a suit brought under the Civil Rights Act. 468 F.2d at 413. That statement ignores the well-settled doctrine of abstention. *Younger v. Harris, supra;* see also *Mitchum v. Foster,* 407 U.S. 230 (1972).

This Court recently held that injunctive relief under the Civil Rights Act is not available to state prisoners who can assert their claims on federal habeas corpus.

> "The rule of exhaustion in federal habeas corpus actions is rooted in considerations of federal-state comity. That principle was defined in *Younger v. Harris,* 401 U.S. 37, 44 (1971), as a 'proper respect for state functions,' *and it has as much relevance in areas of particular state administrative concern as it does where state judicial action is being attacked.*

". . . The strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors thus also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons." *Preiser v. Rodriguez, supra,* U.S.L.W. at 4560. (Emphasis added).

We therefore respectfully submit that even if this Court does hold that a cause of action was stated under the Civil Rights Act, the doctrine of abstention ought to apply in states like California which provide a remedy for prosecutorial malfeasance.

CONCLUSION

We respectfully submit that the judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

Dated, San Francisco, California,
June 6, 1973.

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IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1972
No. 72-955

W. C. SPOMER, State's Attorney of
Alexander County, Illinois,

Petitioner,

v.

EZELL LITTLETON, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

BRIEF OF THE DISTRICT ATTORNEY OF THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA AS AMICUS CURIAE

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TABLE OF AUTHORITIES CITED

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v.

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE DISTRICT ATTORNEY OF THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA AS AMICUS CURIAE

This brief is filed with this Court pursuant to the authority found in paragraph 4 of Rule 42 of the Supreme Court Rules.

INTEREST OF THE AMICUS CURIAE

The United States Court of Appeals for the Seventh Circuit has announced in the instant case[1] the novel doctrine that where it is "alleged and proved . . . that state officials consistently, designedly and egregiously have, under color of law, deprived an entire group of citizens of their civil rights" (468 F.2d at 415), then a federal court, pursuant to 42 USC § 1983,[2] can grant injunctive relief which includes provision for continuing supervision of state court judges or prosecuting attorneys in order to prevent unconstitutional class discrimination in the enforcement of the criminal laws of the state. The court below, although eschewing the implication that the injunctive relief "require[s] the district court to sit in constant, day-to-day supervision of either state court judges or

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1. The case is reported as Littleton v. Berbling (1972) 468 F.2d 389.

2. 42 USC § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

the State's attorney," provided the district court with "some guidelines as to what type of remedy might be imposed." (468 F.2d at 414.) The injunctive relief contemplated by the court below was indicated as follows:

> "An initial decree might set out the general tone of rights to be protected and require only periodic reports of various types of aggregate data on actions on bail and sentencing and dispositions of compliants. Nevertheless, we have complete confidence in the district court's ability to set up further guides as required[52] and if necessary to consider individual decisions.[53] Difficulty of formulating a remedy if a complaint is proved following a trial cannot be grounds for dismissing the complaint ab initio. We cannot so easily belittle the powers of a court of equity nor the ability of district judges who have grappled with difficult remedies before, e.g., school desegregation orders, railroad reorganizations." [Note] "52 E.g., Abrams, Internal Policy: Guiding the Exercise of Prosecutorial Discretion. 19 U.C.L.A. L. Rev. 1 (1971). [*]

[Note] 53 Id. at 45-49 discussing Regina v. Commissioner of Police ex rel. Blackburn. [1968] 1 Q.B. 118." (468 F.2d at 414-415.)

There can be no doubt that District Judge Dillin in his dissenting opinion was quite right in declaring that "[t]he majority holds, for the first time, that a federal district court has the power to supervise and to regulate by mandatory injunction the discretion which state court judges and state's attorneys may exercise within the limits of the powers vested in them by law." (468 F.2d at 415.) The expression of confidence by the court below "in the district court's ability to set up further guides as required and if necessary to consider individual decisions" (468 F.2d at 415) warrants petitioner W.C. Spomer's interpretation that the court below holds that "[t]he District Court can require, under pain of contempt, that the prosecutor bring a particular change and prosecute it in a manner the District Court regards as sufficiently competent." (Petition by W.C. Spomer, States Attorney of Alexander County, Illinois, at page 7.)[3/]

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3. Although we submit this brief generally in support of petitioner W.C. Spomer (No. 72-955) much of what we say is relevant to the contentions made by petitioners Michael O'Shea and Dorothy Spomer (No. 72-953) and petitioners Berbling and Shepherd (No. 72-1107). This Court has granted certiorari as to both No. 72-953 and No. 72-955.

A decision by this Court upholding the doctrine announced by the court below would have a profound impact upon the administration of criminal justice in state proceedings and would seriously dislocate federal-state relations in this sensitive area.

The District Attorney of Los Angeles County is responsible for the prosecution of felonies and many misdemeanors in the County of Los Angeles which has a population of over 7,000,000. With 450 prosecuting attorneys under his supervision, his office is the largest prosecuting agency in the United States. Like many counties or municipalities, the County of Los Angeles has a population comprising a multiplicity of racial, ethnic, religious or other groups based upon "suspect" classifications, such as race, national origin, alienage, indigency, or illegitimacy. (See concurring opinion by Stewart, J., San Antonio School District v. Rodriquez (1973)___U.S.___, 36 L.Ed.2d 16, 58, 93 S.Ct.1278.)

It is quite obvious, we feel, that a litigation with the view of obtaining the type of injunctive relief contemplated by the court below in the instant case would severely burden the administration of justice in both federal and state courts.

In view of the foregoing, we think it appropriate to communicate to this Court our views respecting the novel doctrine announced by the court below. We modestly think that the expression of our concern in this matter will be seen in the light of the fact that it is consistent with our determination that criminal justice in the County of Los Angeles will not be "applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, . . ." Yick Wo v. Hopkins (1886) 118 U.S. 356,373, 30 L.Ed. 220, 227, 6 S.Ct. 1064. An evidence of our determination to that end can be seen in the release on April 24, 1973, noticed in the national press, of a Rand Corporation report entitled PROSECUTION OF ADULT FELONY DEFENDANTS IN LOS ANGELES COUNTY: A POLICY PERSPECTIVE, Prepared for the Los Angeles County District Attorney's Office, with Support of the National Institute of Law enforcement and Criminal Justice, L.E.A.A., Department of Justice, R-1127-DOJ, March 1973, by Peter W. Greenwood, Sorrel Wildhorn, Eugene C. Poggio, Michael J. Strumwasser, and Peter De Leon. This report contains comparative statistical data

concerning racial and ethnic groups.[4/]

This report was prepared pursuant to our request and with our encouragement in order to

4. We include pages 56 through 59 of the report in Appendix A to this brief to show how, while acquittal and conviction rates, distribution of conviction levels, and distribution of sentence levels reflect "moderate to small (but statistically significant) disparities in the treatment of defendants by ethnic group in the courts" (Ibid.at 59), it cannot be concluded by such evidence alone that "state officials consistently, designedly and egregiously have, under color of law, deprived an entire group of citizens of their civil rights, . . ." ("Slipheet" opinion of court below, at p. 40.)

That is, a superficial pattern of discrimination can be established but such a pattern may lead to fallacious inferences without a thoroughgoing, in-depth, statistical study which removes various sociological aspects other than the classification in issue.

It is interesting to consider the Rand finding that "[t]he black acquittal rate is considerably higher than that of the Anglo-Americans and, to a somewhat lesser extent, higher than that of the Mexican-Americans" (Op. cit. at 56)in the light of this Court's observation in Greenwood v. Peacock (1966) 384 U.S. 808, 832, 16 L.Ed.2d 944, 959, 86 S.Ct. 1800, in disapproving the notion that a criminal case in a state court could be removable to a federal court upon a petition alleging that the defendant was being prosecuted because of his race, that "such removal petitions could, of course, be filed not only by Negroes, but also by members of the Caucasian or any other race." (384 U.S. at 832, 16 L.Ed.2d at 959 n. 31.)

ascertain, inter alia, what improvements could be made in the criminal justice system with respect to patterns of law enforcement which suggest that justice is not meted out even-handedly in the County of Los Angeles. With this concern in mind, we submit this brief in order that bona fide efforts by the Office of the District Attorney of the County of Los Angeles to improve law enforcement will not be impeded by unnecessary litigation in federal courts.

SUMMARY OF THE ARGUMENT

We are not concerned with the questions of injunctive relief pursuant to 42 USC § 1983 which have hitherto been considered by federal courts with respect to state court judges or state prosecuting attorneys. Thus, we are not concerned with injunctive relief requiring the performance of ministerial duties, or which would prohibit pending or threatened prosecutions. Rather, the instant case involves the development of a novel doctrine which would authorize an on-going supervision of state court judges or state prosecuting attorneys in order to prevent the non-enforcement of criminal laws as to real or purported victims and where such supervision would necessarily or probably require review of individual cases where prosecutions have not been undertaken at the requests of real or purported victims of crimes.

We argue that such equitable relief, in the form or nature of a mandatory injunction, would be inconsistent with those principles of federalism, comity, and equity which have been formulated and applied by this Court.

Moreover, we contend that the doctrine announced by the court below is inconsistent with the purposes underlying the doctrine that 42 USC § 1983 did not abolish the common-law immunities of state officials performing judicial or quasi-judicial duties.

We do not urge that 42 USC § 1983 forbids all injunctive relief with respect to the judicial or quasi-judicial acts of state officials to whom the common-law immunities apply. We do, however, contend that the supervision by way of mandatory injunction such as that contemplated by the court below of state officials performing judicial or quasi-judicial duties which involve discretion not to prosecute would so undermine the purposes of the common-law immunities that no reason could be discerned for maintaining such immunities even in damage suits under § 1983.

Furthermore, it would appear that under the constitutional separation of powers, there is no reason for believing (but every reason to the contrary) that federal judges should review the discretionary acts of federal

prosecuting officers by the type of supervision contemplated by the court below. Any doctrine that the Supremecy Clause overrides any constitutional separation of powers pertaining to the states cannot be without limitation in view of the nature of each branch of government. The reasons underlying separation of powers are based upon common-law ideas and prudential considerations which apply equally to the states. Such factors should cause this Court to be especially leary of permitting federal courts to embark on the supervision of state officials on a grand scale.

Even if the civil rights complaint herein would be deemed, in other circumstances, to be legally sufficient to state a claim under 42 USC § 1983, it does not follow that it is legally sufficient to state a claim for injunctive relief of the type contemplated by the court below. Moreover, the evidence which would justify such injunctive relief must necessarily be more compelling than that which would justify some lesser and more traditional type of equitable relief, such as a prohibitory injunction respecting actual or threatened prosecutions.

Finally, we contend, that even if equitable relief which would entail comprehensive supervision of state court judges or state prosecuting attorneys such as is contemplated by the court below can be proper in some cases, we urge

that such relief should only extend to those state officials who have intentionally and knowingly engaged in unconstitutional law enforcement rather than also to their colleagues or successors in office who are not alleged and found to have abused their positions.

ARGUMENT

I

WHILE 42 USC § 1983 AUTHORIZES INJUNCTIVE RELIEF FOR VIOLATIONS OF THE EQUAL PROTECTION CLAUSE, THE INJUNCTIVE RELIEF CONTEMPLATED BY THE COURT BELOW VIOLATES THE PRINCIPLES OF COMITY, FEDERALISM, AND EQUITY ESTABLISHED BY THIS COURT

Of course, it must be conceded that mere failure to prosecute other offenders is no basis for a finding that there has been a denial of equal protection of the laws. One must show an intentional or purposeful discrimination in order to show that unequal administration of a state statute offends the equal protection clause. The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Statistics might imply a policy of selective

enforcement,[5] but a finding of a denial of equal protection is not supported unless the selection was deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification. See, generally, Yick Wo v. Hopkins (1886) 118 U.S. 356, 30 L.Ed. 220, 6 S.Ct. 1064; Snowden v. Hughes (1944) 321 U.S. 1, 88 L.Ed. 497, 64 S.Ct. 397; Oyler v. Boles (1962) 368 U.S. 448, 7 L.Ed.2d 446, 82 S.Ct. 501; Moss v. Hornig (2d Cir. 1963) 314 F.2d 89. We agree, of course, that "the sharp edge of the Supremacy Clause cuts across all such generalizations" such as that "[a] federal court is always reluctant to interfere with state criminal proceedings, because of statutory restraints and because of respect for the doctrine of comity." (United States v. McLeod (5th Cir.1967) 385 F.2d 734, 745; footnotes omitted.) But in considering whether 42 USC § 1983 authorizes a federal court to grant injunctive relief of a nature as set forth by the court below, we bear in

5. An in-depth statistical study may disclose that, once the effects of other sociological aspects are removed, a defendant's race becomes a neutral factor in the administration of criminal justice although some data may superficially suggest racial bi s. See, for example, A Study of the California Penalty Jury in First-Degree Murder Cases, 21 Stanford L.Rev. (Special Issue, June 1969) 1297, 1420-1421.

mind the words of Mr. Justice Douglas in his dissenting opinion in Pierson v. Ray, infra, 386 U.S. at 558, 565, 18 L.Ed.2d at 297, 301, that "[t]he question presented is not of constitutional dimension; it is solely a question of statutory interpretation."

There can be no doubt that in the light of the history of the ancestor of 42 USC § 1983,[6] as set forth in the opinions of this Court concerning it,[7] that it "is proper for a person adversely affected to bring an action under 42 USC § 1983 on the grounds that he has been denied his rights under the equal protection clause of the Constitution." (Shock v. Tester (8th Cir. 1969) 405 F.2d 852, 855.) Section 1983 provides for equitable relief as a remedy and this Court in Mitchum v. Foster, 407 U.S. 225, has held that this statute constitutes an "expressly authorized" exception to the federal anti-injunction statute (28 USC § 2283) which

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6. The statute is derived from § 1 of the Ku Klux Klan Act of 1871, Act of April 20, 1871, c 22, § 1, Stat 13.

7. See Monroe v. Pape (1960) 365 U.S. 167, 172-178, 5 L.Ed.2d 492, 497-500, 81 S.Ct. 473; Mitchum v. Foster (1972) 407 U.S. 225, 32 L.Ed.2d 705, 715-717, 92 S.Ct. 2151; District of Columbia v. Carter (1973) ___ U.S. ___, 34 L.Ed.2d 613, 621-623, 93 S.Ct. 602.

provides that a federal court "may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to promote or effectuate its judgments." But this Court has just recently re-affirmed in Gibson v. Berryhill (1973) _____U.S._____, 41 LW 4576, 4579, that:

> "As we expressly stated in Mitchum, nothing in that decision purported to call into question the established principles of equity, comity and federalism which must, under appropriate circumstances, restrain a federal court from issuing such injunctions. Id., at 243. These principles have been emphasized by this Court many times in the past, albeit under a variety of different rubrics. . . . . Secondly, there is the basic principle of federalism, restated as recently as 1971 in Younger v. Harris, 401 U.S. 37 (1971), that a federal court may not enjoin a pending state criminal proceeding in the absence of special circumstances suggesting bad faith, harrassment or irreparable injury that is both serious and immediate."

This Court in Younger v. Harris, 401 U.S. at 44, 27 L.Ed.2d at 675, 91 S.Ct. 746, said that a vital consideration for restraining courts of

equity from interfering with criminal prosecutions is "the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and continuance of the belief that the National Government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways."

However, what is involved in the instant case is not an action which merely seeks injunctive relief to enjoin state proceedings. Rather, it is an action which would, if successful, result in injunctive relief entailing provisions for supervision and review of discretionary acts of state court judges and prosecuting attorneys which would generate undue pressures upon such officers to institute criminal prosecutions, when otherwise such prosecutions would not have been instituted, in order to avoid complaints that state laws are being unequally and unlawfully enforced. Such federal judicial interference with the administration of state criminal justice would, it seems to us, be of far greater magnitude and intensity than that which would be entailed if only preventive injunctive relief were granted.

II.

THE DOCTRINE OF THE COURT BELOW RESPECTING EQUITABLE RELIEF SUBVERTS THE PURPOSES OF THE IMMUNITY OF STATE JUDGES OR PROSECUTING ATTORNEYS UNDER 42 USC § 1983

Again, while not questioning the availability of equitable relief against state judges or prosecuting attorneys as they have been generally provided for in the reported cases, we are nevertheless of the opinion that the doctrine set forth by the court below expands the scope of equitable relief as to such state officials in violation of the principles supporting the immunity of state judges or prosecuting attorneys under § 1983 against suits. Our contention is based upon the following argument.

It is generally maintained that prosecuting attorneys should have the same immunity as is afforded judges in civil rights actions under 42 USC § 1983, although such immunity is not without limitation. In addition to the Seventh Circuit, as evidenced by its opinion in the instant case, see also: Bauers v. Heisel (3d Cir. 1966) 361 F.2d 581, 589-591; Turack v. Guido (3d Cir. 1972) 464 F.2d 535, 536; McCray v. State of Maryland (4th Cir. 1972) 456 F.2d 1, 2-3; Madison v. Gerstein (5th Cir. 1971) 440 F.2d 338, 340-341; Kenney v. Fox (6th Cir. 1956) 288 F.2d 228, 290; Puett v.

City of Detroit, Department of Police (6th Cir. 1963) 323 F.2d 591, 593; Hilliard v. Williams (6th Cir. 1972) 465 F.2d 1212; Robichaud v. Ronan (9th Cir. 1965) 351 F.2d 533, 535-536; Marlowe v. Coakley (9th Cir. 1968) 404 F.2d 70; Kostal v. Stoner (10th Cir. 1961) 292 F.2d 492, 493-494. Such prosecutorial immunity is not generally understood to encompass acts clearly outside a prosecutor's jurisdiction; that is, a prosecuting attorney who acts outside the scope of his jurisdiction without authorization of law cannot shelter himself by the plea that he is acting under color of office. It is well said that "[t]he immunity of 'quasi-judicial' officers such as prosecuting attorneys . . . derives, not from their formal association with the judicial process, but from the fact they exercise a discretion similar to that exercised by judges [and that] [l]ike judges, they require the insulation of absolute immunity to assure the courageous exercise of their discretionary duties." (McCray v. State of Maryland, supra, 456 F.2d at 3.) It should be noted that "[t]he key to the immunity previously held tc be protective to the prosecuting attorney is that the acts, alleged to have been wrongful, were committed by their officer in the performance of an integral part of the judicial process." (Robichaud v. Ronan, supra, 351 F.2d at 536.) At least in damage suits, a prosecutor can have no vicarious liability for the acts of his assistant against which

the assistant is immunized. (Madison v. Gerstein, supra, 440 F.2d at 340.)

The almost uniform stand taken by the courts of appeal, and we omit citations to decisions by other courts, is a sufficient reason, considered in the light of the opinions by this Court in Tenney v. Brandhove (1951) 341 U.S. 367, 95 L.Ed. 1019, 71 S.Ct. 783 and Pierson v. Ray (1967) 386 U.S. 547, 18 L.Ed.2d 288, 87 S.Ct. 1213, for the generally approved doctrine that immunity for prosecutors is not abolished by 42 USC § 1983.

Since it seems warranted for us to conclude that this Court would hold that the common-law immunity of prosecutors applies to actions brought under 42 USC § 1983 (or related statutes), the question arises to what extent does the doctrine of immunity for judges or quasi-judicial officers (particularly prosecuting attorneys) apply to injunctive relief.

It has been generally held, declared by dictum, or otherwise indicated that under 42 USC § 1983 (or other similar civil rights statutes), the immunity of state judges or state officers performing quasi-judicial functions (such as prosecuting attorneys) pertains to damage suits but does not preclude declaratory or injunctive relief if prayed for. See, e.g.: Silver v. Dickson (9th Cir. 1968) 403 F.2d 642, 643; Jacobson v. Schaefer (7th Cir.

1971); 441 F.2d 127, 130; United States v. McLeod (5th Cir. 1967) 385 F.2d 734, 738 n. 3; United States v. Clark (S.D.Ala. 1965) 249 F.Supp. 720, 727; Stambler v. Dillon (S.D.N.Y. 1968) 288 F. Supp. 646, 649; Rouselle v. Perez (E.D.La. 1968) 293 F.Supp. 298, 299; Law Students Civil Rights Research Council, Inc. v. Wadmond (S.D.N.Y. 1969) 299 F.Supp. 117, 123-124, aff'd, 401 U.S. 154, 27 L.Ed.2d 749, 91 S.Ct. 720; Bramlett v. Peterson (M.D. Fla. 1969) 307 F.Supp. 1311, 1321-1322; Rakes v. Coleman (E.D.Va. 1970) 318 F.Supp. 181, 192; Palermo v. Rockefeller (S.D.N.Y. 1971) 323 F.Supp. 478, 482; Haley v. Troy (D.Mass. 1972) 338 F.Supp. 794, 800; Mills v. Larson (W.D.Pa. 1972) 56 F.R.D. 63, 67-68, and, of course, the instant case.[8] Of course, as the majority opinion recognizes, the comprehensive nature of the equitable relief which it contemplates compels the conclusion that "this appears to be a case of first impression as to the type of relief approved, . . ." (468 F.2d at 414.) This case does not involve injunctive relief pertaining to civil actions, or which prohibits pending or

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8. Although the court below noted Peckham v. Scanlon (7th Cir. 1957) 241 F.2d 761 in its opinion in the instant case (468 F.2d at 406), it appears that it did not notice that it sub silencio overruled Scanlon because the plaintiff therein prayed for both damages and equitable relief (241 F.2d at 762-763).

threatened criminal prosecutions, or the enforcement of an unconstitutional law, or requiring the performance of ministerial acts. Rather, as Judge Dillin in his dissenting opinion observed, "[t]he majority holds, for the first time, that a federal district court has the power to supervise and to regulate by mandatory injunction the discretion which state court judges and state's attorneys may exercise within the limits of the powers vested in them by law" and that "in the cases cited by the majority . . . the equitable relief granted has invariably been in the form of a prohibitory injunction, confining such officials to the limits of their legal authority." (468 F.2d at 415; footnote omitted.)

Bearing in mind that we are thus concerned with the issue of availability of injunctive relief which includes provision for the comprehensive supervisory review of discretionary acts by state judges and prosecutors in criminal prosecutions, it behooves us to see why this Court in Tenney and Pierson held respectively that the common-law immunity of legislators for acts within the legislative role and that the immunity of judges for acts within the judicial role were not abolished by § 1983. In Tenney the Court explained:

> "The claim of an unworthy purpose does not destroy the privilege. Legislators

are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." (341 U.S. at 377, 95 L.Ed. at 1027.)

In Pierson, the Court, in explaining its holding that the common-law doctrine of judicial immunity applies to damage suits under § 1983, said:

"Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in Bradley v. Fisher, 13 Wall 335, 20 L ed 646 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest

it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.' (Scott v Stansfield, LR 3 Ex 220, 223 (1868) quoted in Bradley v Fisher, supra, 349; note, at 350, 20 L ed at 650.) It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." (386 U.S. at 554, 18 L.Ed.2d at 294-295.)

It is noteworthy that, although Mr. Justice Douglas dissented from that holding, he acknowledged the importance of exempting judges from liability for the consequences of their honest mistakes and that the judicial function involves an informed exercise of judgment. (386 U.S. 558, at 566, 18 L.Ed.2d 297, at 301.)

When one considers the reasons why there should be immunity from damage suits for state judges and prosecuting attorneys, the conclusion is compelled that the reasons justify the applicability of the immunity to such injunctive

relief which would accomplish the same results as the absence of the immunity from damage suits. Judge Dillin clearly saw the necessity of this conclusion when he maintained in his dissenting opinion in the instant case that

> "the reason for the rule against damage actions applies with equal force to mandatory injunctions which seek to regulate the exercise of discretion of judicial and quasi-judicial officers. It would be cold comfort for such an official to be told by this Court; 'Be of good cheer! We will protect your pocketbook, even as we send you to jail.'" (468 F.2d at 419; footnote omitted.)

But it is not, of course, merely the threat of jail that would undermine the rationale for judicial or quasi-judicial immunity as the explanations by this Court in Tenney and Pierson make clear. It is also the apprehension of a comprehensive inquiry by the federal judiciary of discretionary acts of state judicial or quasi-judicial officers and the inconveniences and distractions incident thereto which would unduly inhibit such officers in the exercise of their powers. Whatever supposed gain for civil rights, the present "ecological" equilibrium would be radically upset were it now deemed that the immunity doctrine does not encompass immunity

from mandatory injunctions which entail the supervision and review of discretionary judicial and quasi-judicial acts.

Clearly, the doctrine propounded by Judge Dillin is consistent with those holdings which have permitted equitable relief against judges and prosecutors because the federal courts did not undertake a supervisory direction of the administration of state criminal justice with a provision for review of discretionary acts, including review of decisions not to prosecute. However, the doctrine announced by the court below would be inconsistent with the contrary philosophy held by this Court as evidenced, for example, in Ker v. California (1963) 374 U.S. 23, 33, 10 L.Ed.2d 726, 738, 83 S.Ct. 1623, where the Court declared that,

> "although the standard of reasonableness is the same under the Fourth and Fourteenth Amendments, the demands of our federal system compel us to distinguish between evidence held inadmissible because of our supervisory powers over federal courts and that held inadmissible because prohibited by the United States Constitution."

The overall supervisory review, albeit not "constant, day-to-day supervision," contemplated by the court below if actually undertaken would constitute "direct intrusion in state processes [which] does not comport with proper federal-

state relationships," to use the words of this Court in Cleary v. Bolger (1963) 371 U.S. 392, 401, 9 L.Ed.2d 390, 397, 83 S.Ct. 385. Or, to borrow words from Stefanelli v. Minard (1951) 342 U.S. 117, 120, 96 L.Ed. 138, 142, 72 S.Ct. 118:

> "For even if the power to grant the relief here sought may fairly and constitutionally be derived from the generality of language of the Civil Rights Act, to sustain the claim would disregard the power of courts of equity to exercise discretion when, in a matter of equity jurisdiction, the balance is against the wisdom of using their power. Here the considerations governing that discretion touch perhaps the most sensitive source of friction between States and Nation, namely, the active intrusion of the federal courts in the administration of the criminal law solely within the power of the States."

The very fact that the doctrine announced by the court below is novel justifies the inference that "the provisions of [42 USC § 1983] do not operate to work a wholesale dislocation of the historic relationship between the state and the federal courts in the administration of criminal justice." (Cf. Greenwood v. Peacock (1966) 384 U.S. 808, 831, 16 L.Ed.2d

944, 959, 86 S.Ct. 1800.)

III.

THE SUPERVISION OF STATE COURT JUDGES OR PROSECUTING ATTORNEYS CONTEMPLATED BY THE COURT BELOW IS SINGULARLY INAPPROPRIATE AS A JUDICIAL FUNCTION

The discretion of the Attorney General of the United States in choosing whether to prosecute or not to prosecute, or to abandon a prosecution already started, is absolute. Courts are not free to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions. See, e.g., Smith v. United States (5th Cir. 1967) 375 F.2d 243, 246-247; United States v. Kysar (10th Cir. 1972) 459 F.2d 422, 424; Spillman v. United States (9th Cir., 1969) 413 F.2d 527, 530. Although this all follows as an incident to the constitutional separation of powers, as Chief Justice (then Circuit Judge) Burger observed in Newman v. United States (D.C. Cir. 1967) 382 F.2d 479, 480:

> "Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought."

The discretion of the prosecuting attorney for the United States to be free from judicial supervision of the discretionary control of criminal prosecutions, including attempts to compel a prosecuting attorney to initiate proceedings, presupposes that the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. As Chief Justice Burger commented:

> "To say that the United States Attorney must literally treat every offense and every offender alike is to delegate him an impossible task; of course this concept would negate discretion. Myriad factors can enter into the prosecutor's decision. Two persons may have committed what is precisely the same legal offense but the prosecutor is not compelled by law, duty or tradition to treat them the same as to charges. On the contrary, he is expected to exercise discretion and common sense to the end that if, for example, one is a young first offender and the other older, with a criminal record, or one played a lesser and the other a dominant role, one the instigator and the other a follower, the prosecutor can and should take such factors into account; no court has any jurisdiction to inquire into

or review his decision.

"It is assumed that the United States Attorney will perform his duties and exercise his powers consistent with his oaths; and while this discretion is subject to abuse or misuse just as is judicial discretion, deviations from his duty as an agent of the Executive are to be dealt with by his superiors." (382 F.2d at 481-482; footnotes omitted.)

It must be remembered, as was noted in United States v. Brokaw (S.D.Ill.1945) 60 F. Supp. 100, 101:

"That the United States District Attorney in his capacity as the public prosecutor in his district is clothed with the power and charged with the duties of the Attorney General in England under the common law is generally recognized and supported by the Federal Courts. [Citations omitted.] In this connection the federal prosecutor acts in an administrative capacity. He is the representative of the public in whom is lodged a discretion to be exercised for the general public welfare, a discretion which is not to be controlled by the courts, or by an interested individual, or by a group of interested individuals who seek redress for wrongs committed

against them by use of the criminal process."

If the discretionary liberty of prosecuting attorneys from judicial interference with or review of discretion is grounded in the common law (see Ganger v. Peyton (4th Cir. 1967) 379 F.2d 709, 713) and if "[f]ew subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought" (see Newman v. United States, supra, 382 F.2d at 480), then there is all the more reason to conclude that 42 USC § 1983 should not be used to permit federal courts to systematically and comprehensively supervise state court judges and prosecutors in the exercise of their discretion merely as a prophylactic measure to prevent racial or ethnic discrimination.

The separation of executive and judicial functions is grounded upon prudential considerations. Thus, Coolidge v. New Hampshire (1971) 403 U.S. 443, 449-453, 29 L.Ed.2d 564, 572-575, 91 S.Ct. 2022, held that search warrants could not be issued by the state attorney general, acting as a justice of the peace, under the Fourth Amendment, because such an official was not a neutral and detached

magistrate. But it is the very confusion of judicial and executive roles which compelled the holding for as this Court explained:

> "Without disrespect to the state law enforcement agent here involved, the whole point of the basic rule so well expressed by Mr. Justice Jackson is that prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations - the 'competitive enterprise' that must rightly engage their single-minded attention." (403 U.S. at 450, 29 L.Ed.2d at 573. Footnote omitted.)

Cf. Shadwick v. City of Tampa (1972) 407 U.S. 345, 32 L.Ed.2d 783, 92 S.Ct.2119. Thus, we submit that, quite apart from federal-state relations, the exercise by a federal court judge of executive powers, such as is involved in supervising and reviewing decisions not to institute or further prosecute criminal charges, is a confounding of roles not at all contemplated by those who framed and adopted the Constitution. Moreover, even if, at the outset, an adoption of the executive power by the federal courts is limited to the supervision of state officers, the exercise of such executive power by federal court judges may well give rise to the fear that "[w]ere it [the power of judging] joined to the executive power, the judge might behave with

all the violence of an oppressor." Montesquieu, SPIRIT OF LAWS, quoted in THE FEDERALIST No. 47 (ed. by Jacob E. Cooke, Meridian Books - 1961) at 326. Our conclusion is that the exercise of the executive power which is implicit in the equitable relief sanctioned by the court below is so incompatible with the functions of the federal judiciary that this Court should disapprove such use as a type of the equitable relief permitted by 42 USC § 1983.

IV

ASSUMING THAT EQUITABLE RELIEF AUTHORIZED BY 42 USC § 1983 ENCOMPASSES THE TYPE OF MANDATORY INJUNCTION COMTEMPLATED BY THE COURT BELOW, IT SHOULD BE LIMITED TO THOSE OFFICIALS WHO HAVE INTENTIONALLY AND KNOWINGLY FAILED TO ENFORCE CRIMINAL LAWS BASED UPON UNJUSTIFIABLE CLASSIFICATION OF VICTIMS

Even if novel injunctive relief as contemplated by the court below were deemed appropriate, contrary to our contentions, we urge that such relief should be limited to those state officials who have intentionally and knowingly failed to enforce the criminal laws based upon some unjustifiable classification of victims, such as race.[9] Without

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9. Additionally, we respectfully suggest that the complaint should also allege sufficient

(continued on page 32.)

such a limitation, the federal courts would have the authority to extend their supervision of the administration of state criminal justice to those officials who are the colleagues or successors in office of those who are individually culpable for unequal and unlawful enforcement of the laws.

In the instant case, petitioner W.C. Spomer has been automatically substituted as a party to the extent the cause affects the State's Attorney of Alexander County because '[o]ne of the original parties to this action was Peyton Berbling who was sued individually and as State's Attorney of Alexander County, Illinois [but] [o]n December 4, 1972, Peyton Berbling was succeeded as State's Attorney by W. C. Spomer." (Petition by W. C. Spomer at p. 1.) There are no allegations in the amended complaint to show that there is reason to believe that petitioner W. C. Spomer

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(continued from page 31)

facts which would justify the supervision and review of discretionary acts of judicial or quasi-judicial officers if such relief is requested by the plaintiff(s). "No latitude of intention should be indulged in a case like this. There should be certainty to every intent . . . . This is a matter of proof; and no fact should be omitted to make it out completely, when the power of a Federal court is invoked to interfere with the course of criminal justice of a state." (Cf. Ah Sin v. Wittman (1905) 198 U.S. 500, 507-508, 49 L.Ed. 1142, 1145-1146, 25 S.Ct. 756.)

will discriminatorily enforce the laws as allegedly did his predecessor. (Compare: Two Guys from Harrison-Allentown v. McGinley (1961) 366 U.S. 582, 588-589, 6 L.Ed.2d 551, 556, 81 S.Ct. 1135.) We contend that those same considerations of federalism, comity, and equity, which have been recognized in Younger v. Harris and its companion cases[10/] and the prudential considerations underlying the separation of powers, should at least restrain federal courts from fashioning equitable relief which would control discretionary acts of state judges or prosecuting attorneys pursuant to claims for equitable relief under 42 USC § 1983 as to such officials who have not intentionally and knowingly failed to enforce the law based upon an unjustifiable classification, such as race, in violation of the equal protection clause.

With respect to the colleagues of a state official, the case of Handy Cafe v. Justices of the Superior Court (1st Cir. 1957) 248 F.2d 485, is pertinent. In Handy Cafe, a civil rights action under 42 USC

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10. Samuels v. Mackell, 401 U.S. 66, 27 L.Ed.2d 688, 91 S.Ct. 764; Boyle v. Landry, 401 U.S. 77, 27 L.Ed.2d 696, 91 S.Ct. 758; Perez v. Ledesma, 401 U.S. 82, 27 L.Ed.2d 701, 91 S.Ct. 674; Dyson v. Stein, 401 U.S. 200, 27 L.Ed.2d 781, 91 S.Ct. 769; Byrne v. Karalexis, 401 U.S. 216, 27 L.Ed.2d 792, 91 S.Ct. 777.

1983 was filed against "the members of the Superior Court and Supreme Judicial Court of the Commonwealth of Massachusetts" for various acts and omissions. Equitable, and other relief, was prayed for. The Court of Appeals for the First Circuit affirmed the judgment of the district court dismissing the complaint and in so doing explained, inter alia:

> In addition to the foregoing, we are bound to observe that we know of no authority to the effect that 'the members of the Superior Court and Supreme Judicial Court of the Commonwealth of Massachusetts' constitute suable legal entities. Action under the Civil Rights Act must be against the individual persons or officials who, under color of their respective state offices, subject a person to denial of federal constitutional rights. There are over thirty judges of the Massachusetts Superior Court throughout the Commonwealth and seven justices of the Supreme Judicial Court. Obviously not all of these persons could have been concerned with the various state court proceedings herein complained of. It does not appear against which individual judgments for damages and enforcement orders are sought to be issued." (248 F.2d at 487.)

Our position that equitable relief should

not be granted under 42 USC § 1983 to those who supervise state judges or prosecutors in the exercise of their discretionary judicial or quasi-judicial acts and who have not personally violated federal constitutional or civil rights is supported by the doctrine, held by some courts, that a state or any state agency or subdivision, which is but an arm of the state government - at least, when acting in a sovereign, as distinguished from a proprietary capacity - is not liable as a "person" for the purpose of 42 USC § 1983. (See e.g., Meyer v. State of New Jersey (3d Cir. 1972) 460 F.2d 1252; United States ex rel. Gittlemacker v. County of Philadelphia (3d Cir. 1969) 413 F.2d 84, 86; Hewitt v. City of Jacksonville (5th Cir. 1951) 188 F.2d 423, 424; Collins v. State of Florida (5th Cir. 1970) 432 F.2d 60; Deane Hill Country Club, Inc. v. City of Knoxville (6th Cir. 1967) 379 F.2d 321, 324; United States ex rel. Lee v. People of the State of Illinois (7th Cir. 1965) 343 F.2d 120; Williford v. People of California (9th Cir. 1965) 352 F.2d 474; Loux v. Rhay (9th Cir. 1967) 375 F.2d 55, 58.) Some courts which hold to this doctrine also maintain that the rule of non-liability of a body politic under § 1983 also applies to suits for injunctive relief.[11]

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11. See Lehman v. City of Pittsburgh (3d Cir. 1973) 474 F.2d 21, 22; Educational Equality League v. Tate (3d Cir. 1973) 472 F.2d

In Deane Hill Country Club, Inc. v. City of Knoxville (6th Cir. 1967) 379 F.2d 321, the implications of this two-fold doctrine are clearly understood. In that case the defendants were the City of Knoxville and George F. McCanless, Attorney General of Tennessee. The Court of Appeals for the Sixth Circuit held that the statute was inapplicable, and declared that this court in Monroe v. Pape, supra, 365 U.S. at 191 n. 50, "seemingly settled the question of whether equitable relief against a municipality could be obtained under Section 1983."[12]

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612 n. 1; Diamond v. Pitchess (9th Cir. 1969) 411 F.2d 565, 567; Agnew v. City of Compton (9th Cir. 1956) 239 F.2d 226, 230; Deane Hill Country Club, Inc. v. City of Knoxville (6th Cir. 1967) 379 F.2d 321, 324; Cf. Handy Cafe v. Justices of the Superior Court (1st Cir. 1957) 248 F.2d 485, 487; Cobb v. City of Malden (1st Cir. 1953) 202 F.2d 701.

Among those courts which take the contrary view, see, e.g.: Harkless v. Sweeny Independent School District (5th Cir. 1970) 427 F.2d 319, 321-323; Garren v. City of Winston-Salem, North Carolina (4th Cir. 1972) 463 F.2d 54, 55; Adams v. City of Park Ridge (7th Cir. 1961) 293 F.2d 585; Schnell v. City of Chicago (7th Cir. 1969) 407 F.2d 1084.

12. Just recently this Court has held in Moor v. County of Alameda (1973) ___U.S.___, 41 L.W. 4627, that a federal cause of action does not lie against a municipality under 42 USC §§ 1983 and 1988 for the actions of its officers which violate an individual's federal civil rights where the municipality is subject to such liability under state law. The Court expressly noted that "the question . . .

(continued on page 37)

(379 F.2d at 324.) The court then proceeded to declare:

> "Nor can this action be maintained against defendant McCanless, Attorney General of the State of Tennessee, under

(continued from page 36)

whether a municipality may be sued for equitable relief under § 1983 - simply is not presented here." (41 L.W. at 4628 n. 2.) Justice Douglas in his dissenting opinion remarked, "There may be overtones in Monroe v. Pape, that even suits in equity are barred [but] [y]et we never have so held." (41 L.W. at 4636.)

For an able exposition of the reasons why the doctrine of equitable relief should not be obtained under § 1983 against a state, or its agency or subdivision, or an officer in his official or representative capacity (regardless of his personal involvement in causing any deprivation of rights), see Harkless v. Sweeny Independent School District (S.D.Tex. 1969) 300 F.Supp. 794, 800-807 (albeit reversed by the Court of Appeals for the Fifth Circuit in 427 F.2d 319). Also compare § 1983 with 42 USC § 1971 which provides concerning a suit by the United States Attorney General for preventive relief that "(c) . . . . [w]henever, in a proceeding instituted under this subsection any official of a State or subdivision thereof is alleged to have committed any act or practice constituting a deprivation of any right or privilege secured by subsection (a) of this section, the act or practice shall also be deemed that of the State and the State may be joined as a party defendant and, if, prior to the institution of such proceeding, such official has resigned or has been relieved of his office and no successor has assumed such office, the proceeding may be instituted against the State."

> section 1983. Clearly the State of Tennessee is not liable as a 'person' within the meaning of this section ([citation omitted]), and because section 1983 imposes liability only upon a person who 'subjects or causes to be subjected' any other person to the deprivation of rights secured by the Constitution, it is, briefly stated, the individual's conduct which forms the basis of liability. 'The Act prescribes two elements * * * (1) the conduct complained of must have been done by some person acting under color of law; and (2) such conduct must have subjected the complainant to the deprivation of rights. * * *' Bastista v. Weir, 340 F.2d 74, 79 (3d Cir. 1965) (Emphasis added) The complaint sets forth no conduct by defendant McCanless which could possibly be construed as depriving plaintiff of any rights; it merely appears that McCanless was made a party defendant because a statute of Tennessee was claimed to be unconstitutional." (379 F.2d at 324.)

Even were this Court to expressly determine that equitable relief can be obtained in a civil rights action under § 1983 against a state, or an agency or subdivision thereof, or against a state officer sued in his representative rather than individual, capacity, we respectfully submit that the argument set forth in

This portion of our brief has value with respect to discretionary judicial or quasi-judicial acts of judges or prosecuting attorneys relating to the administration of criminal justice.

CONCLUSION

For the reasons set forth above, it is respectfully urged that this Court disapprove the novel doctrine announced by the court below, reverse its judgment, and affirm the judgment of the district court dismissing respondents' amended complaint.

Respectfully submitted,

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DISTRIBUTION OF SENTENCE LEVELS BY TYPE OF ATTORNEY[a]

(In percent)

Type of Attorney	Sentence Level		
	Felony	Misdemeanor	§17 PC
Public Defender	44.0	52.2	3.8
Court-appointed attorney	49.4	47.2	3.4
Private attorney	50.3	45.9	3.8

[a]Sample of 2617 theft defendants in 1970 countywide felony defendant file.

APPENDIX A

RELATIONSHIP BETWEEN ETHNIC GROUP AND PATTERN OF TREATMENT

Within our sample, 48 percent of the defendants were Anglo-American, 40 percent black, and 12 percent Mexican-American. The blacks tended to have more extensive prior criminal records than the Anglo-Americans, and the Mexican-Americans more extensive than the blacks. A slightly greater percentage of the black and Mexican-American defendants were also minors as compared to Anglo-Americans; 11.5 percent of Anglo-Americans were minors whereas 14.0 percent of blacks and 14.9 percent of Mexican-Americans were minors.

Table 37 shows the acquittal rate of defendants in the three ethnic groups. The black acquittal rate is considerably higher than that of the Anglo-Americans and, to a somewhat lesser extent, higher than that of the Mexican-Americans. Table 38 shows that both blacks and Mexican-Americans tend to be convicted of the original felony charged about 9 percent less frequently than Anglo-Americans. Table 39 shows that convicted blacks receive felony sentences roughly 5 percent less frequently than Anglo-Americans, and Mexican-Americans roughly 4 percent less.

Table 37

ACQUITTAL RATE BY ETHNIC GROUP[a]

(In percent)

Race	Acquitted	Convicted
Anglo-American	12.7	87.3
Black	17.3	82.7
Mexican-American	13.5	86.5

[a]Sample of 2617 theft defendants in

Table 38

DISTRIBUTION OF CONVICTION LEVELS BY ETHNIC GROUP[a]

(In percent)

Race	Conviction Level		
	Felony Charged	Lesser Felony	Misdemeanor
Anglo-American	67.0	24.4	8.7
Black	58.5	31.3	10.2
Mexican-American	58.1	31.3	10.6

[a]Sample of 2617 theft defendants in 1970 countywide felony defendant file.

Table 39

DISTRIBUTION OF SENTENCE LEVELS BY ETHNIC GROUP[a]

(In percent)

Race	Sentence Level		
	Felony	Misdemeanor	§17 PC
Anglo-American	48.6	47.7	3.7
Black	43.9	52.3	3.8
Mexican-American	44.7	51.3	4.1

[a]Sample of 2617 theft defendants in 1970 countywide felony defendant file.

Ultimately, efforts to explain these differences can be classified into two hypotheses: either (1) these data demonstrate that the judicial system applies a double standard to minority groups, or (2) more innocent minority group members are being arrested and charged with felonies than innocent Anglo-Americans. Arguments for the first hypothesis are difficult to test with these data, since we have no way of measuring rates of over-arrest except by resorting to the acquittal rates that were the source of our hypotheses. In considering the possibility of over-arrest, however, one must remember that these data include only cases in which the District Attorney's screening has taken place and a Deputy District Attorney has decided a case is worthy of prosecution, and further, a Municipal Court judge has held the defendant to answer after a preliminary hearing to assess the merits of the case. Such screening does not exclude the possibility of over-prosecution of certain groups; in fact, if the over-arrest phenomenon is pronounced enough, we could simply be observing an inadequate correction mechanism that could be rejecting and dismiss-

ing more cases for the over-arrested groups than for the general population, but not frequently enough to compensate fully.

Table 40 shows that most of the differences between the black acquittal rate and that of other ethnic groups is concentrated in three Branches: Los Angeles (Central), Santa Monica, and Pomona. In the remaining five Branches, the differences are small and not statistically significant. Table 40 also shows the ethnic distribution of defendants tried in each of the eight Branches.

We note that there is no similarity between ethnic compositions of the three Branches in which we found acquittal rates related to the defendant's ethnic group. Los Angeles has the county's second largest minority population, Pomona has the second smallest minority population, and Santa Monica is right at the median. Santa Monica is the only Branch in which the Mexican-American acquittal rate is disproportionately high, and it has the county's second smallest Chicano population.

These facts at least suggest that differences in acquittal rates by ethnic group cannot be attributed to differences in either the group of defendants tried in each Branch or, by inference from the ethnic distribution of defendants, the ethnic composition of juries in these Branches. To some extent this tends to operate against the double standard explanation.

These disparities are almost equally pronounced among the Public Defender's clients. The black dismissal rate for Public Defender clients is 17.5 percent higher than we would expect, based on the average dismissal rate for all of the Public Defender's cases. On the basis of present data, we cannot say whether this suggests that blacks are more competently represented at trial by Public Defenders than are Anglo-Americans and Mexican-Americans, or that representation of blacks at the preliminary hearing by the Public Defender's office is inferior. But dismissal rates for blacks represented by court-appointed attorneys or private counsel are not different from those for Anglo-Americans.

Although black dismissal rates (5.7 percent) are slightly higher than those for Anglo-Americans (5.3 percent), the difference is not large enough to account for the

Table 40

BRANCH ACQUITTAL RATES BY ETHNIC GROUP[a]

(In percent)

Race	Los Angeles[b]	Long Beach	Santa Monica[b]	Van Nuys	Torrance	Norwalk	Pomona[b]	Pasadena
Acquittal Rates								
Anglo-American	15.9	10.5	26.2	9.2	13.7	7.1	10.6	17.3
Black	19.9	7.2	12.4	11.8	15.8	8.9	22.8	15.7
Mexican-American	19.6	6.3	25.5	6.8	13.7	6.1	12.5	17.5
Ethnic Distribution of Defendants Tried								
Anglo-American	35.1	52.4	63.2	77.2	34.7	57.1	38.7	52.5
Black	53.2	35.4	30.5	11.2	53.1	14.7	14.9	36.0
Mexican-American	11.7	12.3	6.4	11.6	12.2	28.2	46.3	11.5

[a]Sample of 6,7 theft defendants in 1970 countywide felony defendant file.

[b]Statistically significant differences.

differences in acquittal rate. The most significant cause for the higher black acquittal rate can be found by looking at guilty plea rates. While 62.4 percent of the Anglo-American defendants and 56.7 percent of Mexican-American defendants plead guilty, only 39.9 percent of blacks do so. If we exclude all guilty pleas from the sample and base acquittal rate on this smaller group, we find a *reversal* in the disparities; the black acquittal rate of 28.7 percent is *lower* than either the Anglo-American acquittal rate of 33.7 percent or the Mexican-American rate of 31.2 percent. Of course, the salient question, which remains unanswered, is whether the lower rate of guilty pleas among black defendants reflects a distrust of the judicial system independent of the defendants' guilt, or a greater willingness to fight their cases because of a higher proportion of unwarranted prosecutions. If we believe that trials are accurate measures of true guilt, and if we further believe that no defendant pleads guilty who is not guilty, then in fact, the higher black acquittal rate is attributable to an over-prosecution of blacks. But it can also be argued that there is a positive probability that any prosecution, regardless of its merits, will result in an acquittal if contested; if this argument is true, then the higher black acquittal rate would not necessarily support the over-arrest explanation.

It is also reasonable to ask whether blacks more frequently contest prosecutions because they fare better at trials than Anglo-Americans or Mexican-Americans. An examination of the conviction rates by SOT, court trial, and jury trial shows that this is not the case. Blacks are convicted slightly more often than Anglo-Americans in a contested disposition, but are more likely to have the charge reduced or to receive a misdemeanor sentence.

In summary, there are moderate to small (but statistically significant) disparities in the treatment of defendants by ethnic group in the courts. The apparent greater frequency of acquittals for blacks over either Anglo-Americans or Mexican-Americans is probably attributable to a lesser likelihood that black defendants will plead guilty; 39.9 percent of blacks but 62.4 percent of Anglo-American defendants plead guilty. Both blacks and Mexican-Americans tend to be convicted of the original felony charged (robbery or burglary) about 9 percent less frequently than Anglo-Americans. Convicted blacks receive felony sentences roughly 5 percent less frequently than Anglo-Americans, and Mexican-Americans roughly 4 percent less. In contested dispositions, blacks are convicted slightly more often than Anglo-Americans, but are more likely to be convicted of a lesser charge and to receive a misdemeanor sentence. The most provocative question left unresolved is whether these disparities can be attributed to over-prosecution. The question of over-arrest is simply not amenable to analysis solely by use of the data at our disposal.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-955

W. C. SPOMER, STATES ATTORNEY OF ALEXANDER COUNTY, ILLINOIS,

Petitioner,

vs.

EZELL LITTLETON, ET. AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER.

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OPINIONS BELOW.

The Opinion of the Court of Appeals for the Seventh Circuit is reported at 468 F. 2d 389 and appears in full in the Appendix to the Petition for Certiorari (A1). The Opinion of the District Court for the Eastern District of Illinois is not reported and appears in full in the Appendix to the Petition for Certiorari (A1).

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 6, 1972. This Court's jurisdiction was invoked under 28 U. S. C. § 1254(1). The Petition for Writ of Certiorari was filed on January 3, 1973, and granted on April 2, 1973.

CONSTITUTIONAL PROVISIONS.

Article II, Section 3 of the Constitution of the United States provides in pertinent part:

> "[the President] shall take care that the laws [shall] be faithfully executed."

STATUTORY PROVISIONS.

Sections 1981, 1982, 1983, and 1985 of 42 U. S. C. appear in full in the Appendix to the Petition for Certiorari (A1), pp. 61-63.

QUESTIONS PRESENTED.

1. Whether an injunction compelling a state prosecutor to prosecute is a remedy under the Civil Rights Act of 1871?
2. Whether a state prosecutor is immune from an injunction compelling him to prosecute?
3. Whether respondents have available civil remedies and access to criminal process which are as adequate and more preferable to the unduly burdensome injunction against the state prosecutor?
4. Whether the conclusory complaint drafted by attorneys is insufficient to state a cause of action against a state prosecutor in view of the abuse potential inherent in such suits and the very minimal possibility of respondents prevailing?

STATEMENT OF THE CASE.

This case arises from an amended complaint bringing a civil rights class action filed in the United States District Court for the Eastern District of Illinois. Nineteen named plaintiffs, all but two of whom are black citizens of Cairo and Alexander County, Illinois, seek damages and injunctive relief against the State's Attorney of Alexander County, his investigator, and a Magistrate and Associate Circuit Judge of the Circuit Court for Alexander County. The action, premised on 42 U. S. C. Sec. 1981, 1982, 1983 and 1985, sought damages and injunctive relief against the named functionaries of Alexander County for claimed deprivations, under color of law, custom, and usage, of various rights and immunities secured to the plaintiffs and their class under the Constitution and the above named sections of Title 42.

During the past few years Cairo, Illinois has been an area of major civil rights activity by the black citizens seeking to alleviate alleged racial discrimination. Part of the civil rights activities involved an economic boycott of local merchants who were alleged to have engaged in racially discriminatory practices. As a result of the economic boycott and general civil rights activities in Cairo the investigative, prosecutorial and judicial officials of Alexander County were required to act. It is on the basis of the resultant actions by the local officials that the specific allegations against the Alexander County functionaries rest.

The State's Attorney is alleged to engage in a pattern of discriminatory conduct in that he refuses to allow blacks to give evidence of crimes committed by white citizens

against black citizens of Cairo, refuses to initiate criminal proceedings against whites who batter blacks, employs the grand jury as a means of delaying and defeating the complaints brought by blacks, purposely prosecutes white offenders inadequately, and discriminatorily makes bond, sentence and charging recommendations. Respondents sought injunctive relief prohibiting the State's Attorney from depriving them of their constitutional rights and requiring the State's Attorney to file periodic reports to the district court on the disposition of complaints filed by respondents and members of the class (Appendix to brief, p. 24).

The named judges of Alexander County are alleged to set bond in criminal cases in a discriminatory manner and sentence black defendants to longer criminal terms and imposes harsher conditions than they do for white persons charged with similar offenses. The district court, after allowing the filing of an amended complaint, entered a Memorandum and Order dismissing the complaints for want of jurisdiction and the immunity of the officials for their judicial and quasi-judicial actions. The district court reasoned that in seeking to enjoin the elected officials of Alexander County for their discretionary acts the plaintiffs attempt to cause the federal court to substitute its judgment for that of the duly elected local officials—an action beyond the jurisdiction of the court. The lower court also held that the doctrine of judicial immunity was applicable to the named judges because the actions alleged in the complaint were taken in the course of the judicial duties. Similarly, the court held that the prosecutor and his investigator were also immune from damage claims arising out of their judicial or quasi-judicial acts.

The Court of Appeals reversed and remanded the case to the district court on the basis that the action was improperly dismissed. The Court of Appeals found that

jurisdiction under 42 U. S. C. Sec. 1981 and 1983 did exist and more importantly, the reviewing court considered at length the history, nature, and scope of judicial immunity. The court analyzed the recent decisions on the scope of injunctive relief under Section 1983 and found the "exceptional circumstances" for federal court intervention by injunction of state court criminal prosecutions.

The court then considered the limitations on the concept of prosecutorial immunity and concluded that investigative activities by the prosecutor were not one of the quasi-judicial duties for which he had immunity. Though the court did not hold that the actions of Alexander County State's Attorney complained of in the pleadings were "investigative" in nature, it specifically directed the district court to consider the limitations on the prosecutor's immunity when performing investigative functions. The Court of Appeals concluded by holding that quasi-judicial immunity does not extend complete freedom from injunction to the prosecutor and that the allegations made in the complaint, if established, could merit injunctive relief.

The court, noting that its holding created a case of first impression as to the type of relief approved, volunteered guidelines as to what type of remedy might be imposed, suggesting that periodic reports containing data on bail, sentencing and dispositions of complaints be made by the local officials to the federal district court.

SUMMARY OF ARGUMENT.

The effect of the injunction authorized by the Seventh Circuit will be to compell the state prosecutor to initiate criminal proceedings on complaints filed by respondents or members of respondents class.

The congressional debates surrounding the enactment of the Civil Rights Act of 1871, as well as this Court's interpretation of the Act, make it clear that an injunction compelling a state prosecutor to prosecute is not a remedy under the Civil Rights Act of 1871.

Throughout the entire history of American criminal jurisprudence, the prosecutor, in the exercise of his executive discretion, has remained immune from judicial control. In authorizing this injunction against the state prosecutor, the Seventh Circuit ignored the fact that the prosecutor's role in the criminal justice system, the nature of and need for prosecutorial discretion, and the compelling need for such discretion to remain free from judicial control dictates that the state prosecutor continue to remain immune from the type of injunction authorized by the Court.

Respondents have available civil remedies and access to criminal process at law which are as adequate and more preferable to the unprecedented remedy authorized by the Seventh Circuit. Notwithstanding these remedies, the Court authorized a remedy which would require federal judges to act as state prosecutors, seriously disrupt the historic federal-state relationship in the administration of criminal justice, and unduly burden both the state prosecutor and the federal courts. Such a choice of remedy should not be affirmed by this Court.

The Seventh Circuit improperly held that respondents' conclusory, unsupported complaint sufficiently alleged a

cause of action against the state prosecutor. The potential for undue burden and abuse inherent in the present suit, and the improbability of respondents prevailing at trial requires that respondents' conclusory allegations be deemed insufficient to state a cause of action against the state prosecutor.

ARGUMENT.

A.

The Seventh Circuit held that the state prosecutor was subject to the injunctive relief sought by the respondents.[1] The Court of Appeals suggested that "An initial decree might set out the general tone of rights to be protected and require only periodic reports of various types of aggregate data on actions on bail and sentencing and dispositions of complaints . . ." The Court expressed ". . . complete confidence in the district court's ability to set up further guides as required and, if necessary, to consider *individual decisions.*"[2] (Emphasis added).

The Court envisioned a general decree prohibiting discrimination against respondents or members of their class. The state prosecutor would then be required to submit to

1. Respondents prayed that the defendant State's Attorney be preliminarily and premanently enjoined from:

   A. Depriving plaintiffs and members of the plaintiff class of their constitutional rights (by refusing to prosecute, permit plaintiffs to give evidence, proceed by information, properly interrogate, adequately prosecute, recommend equal bonds, charge equally), and that defendant be required to submit a monthly report to this Court concerning the nature, status and disposition of any complaint brought to him by plaintiffs or members of their class, or by white persons against plaintiffs or members of their class.

   B. Neglecting his duties of office in failing to interrogate impartially and without discrimination witnesses before a grand jury.

   C. Requesting more severe bond and sentences for plaintiffs and members of their class than for white persons.

   D. Setting more severe charges against plaintiffs and members of their class than against white persons. Amended Complaint, Appendix, p. 24.

2. Littleton v. Berbling, 468 F. 2d 398, 415 (7th Cir. 1972).

the district court periodic reports on his actions, and his "individual decisions" would there be reviewed. If the district court were not satisfied by the prosecutor's decisions, presumably the prosecutor would be held in contempt or he would be compelled by mandatory injunction to "correct" his actions in whatever manner appeared satisfactory to the district court. In either event, the ultimate effect of the original decree, as authorized by the Seventh Circuit, would be to compel the state prosecutor to prosecute complaints filed by respondents or members of their class and to prosecute such complaints in a manner satisfactory to the federal court. In effect, the Seventh Circuit authorized a mandatory injunction compelling a state prosecutor to prosecute and to prosecute in a manner satisfactory to a federal court.[3] Such a remedy is improper for the following reasons.

I.

AN INJUNCTION COMPELLING A STATE PROSECUTOR TO PROSECUTE IS NOT A REMEDY UNDER THE CIVIL RIGHTS ACT OF 1871.

The congressional debates surrounding the enactment of the Civil Rights Act of 1871, as well as this Court's interpretation of the Act, make it clear that an injunction compelling a state prosecutor to prosecute is not a remedy under the Civil Rights Act of 1871.

The congressional debates surrounding the Ku Klux Klan Act of April 20, 1871, ch. 22, 17 Stat. 13[4] evidence the

3. The reference to and reliance upon Peek v. Mitchell, 419 F. 2d 575 (6th Cir. 1970) (. . . "where the court denied a similar affirmative injunction *to require prosecution*") and other references to compelling prosecution in the majority opinion clearly indicate that the Seventh Circuit was aware of the effect of the "general guidelines" it suggested. But the ultimate effect of the authorized injunction was squarely confronted only by Judge Dillin in the dissenting opinion.

4. 42 U. S. C. § 1983 derives from § 1 of this Act and 42 U. S. C. § 1985(3) from § 2 of the Act.

intent to provide federal remedy for deprivations of constitutional rights under color of state law.[5] There was henceforth to be a remedy in *federal court* for federally secured rights. As stated by Representative Lowe:

> "[The] records of the [state] tribunals are searched in vain for evidence of effective redress [of federally secured rights] . . . What less than this [the Civil Rights Act of 1871] will afford an adequate remedy? *The Federal Government cannot serve a writ of mandamus upon State Executives or upon State Courts to compel them to protect the rights, privileges and immunities of citizens* . . . The case has arisen when the Federal Government must resort to *its own agencies to carry its own authority into execution.* Hence this bill throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired.[6] (Emphasis added.)

A similar view was expressed by Senator Osborn: "If the State Courts has proven themselves to suppress the local disorders, or to maintain law and order, we should not have been called upon to legislate . . . We are driven by existing facts to *provide for the several states* . . . what they have been unable to fully provide for themselves; i.e. *full and complete administration of justice in the courts.* And courts with reference to which we legislate *must be the United States Courts.*"[7] (Emphasis added.) And as clarified by Senator Thurman:

> "It authorizes any person who is deprived of any right,

5. As Representative Shellabarger stated: The Civil Rights Act of 1871 "not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to all people where, under color of state law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship." Cong. Globe, 42d Cong., 1st Sess., App. 68 (1971). See also Monroe v. Pape, 365 U. S. 167 (1961); Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676.

6. Cong. Globe, 42d Cong. 1st Sess. 374-376 (1871).

7. *Id.*, at 653.

> privilege or immunity secured to him by the Constitution of the United States, to bring an action against the wrongdoer in the Federal Courts, . . . by this section jurisdiction of that civil action is given to the *Federal courts instead of its being prosecuted as now in the courts of the States.*"[8] (Emphasis added.)

The remedy authorized under the Act was to be rendered directly by the federal courts in the course of a civil action holding liable those persons acting under color of state law who had deprived others of their federal rights. That the federal courts were to compel state executives or state courts to provide a remedy was neither authorized nor envisioned. It was well understood that state executives and state courts were unable or unwilling to provide appropriate sanctions.[9] Representative Coburn said that:

> "The United States courts are further above mere local influences than the county courts; their judges can act with more independence; cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State, and not the neighborhood; they will be able to rise above prejudice or bad passions or terror more easily."[10]

The Act was not designed to authorize direct federal compulsion of state executives to prosecute violators of civil rights in state courts. Congress had provided for such criminal prosecution in the *federal courts* by previously enacting 18 U. S. C. §§ 241, 242 (Enforcement Act of 1870)[11]

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8. *Id.*, App. 216.

9. See the message sent to Congress by President Grant, *id.*, p. 224; (Mr. Lowe) p. 374; (Mr. Beatty), p. 428; (Sen. Osborn) p. 653.

10. *Id.*, p. 460.

11. Section 241 is a conspiracy statute. It reads as follows:

> "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

which were the criminal analogues to the civil remedies provided in the Ku Klux Klan Act (42 U. S. C. §§ 1983, 1985 (3)).

Interpretation by this Court of the Act and the debates surrounding the Act supports this view. In *Monroe* v. *Pape*, this Court recognized: "It is abundantly clear that one reason the legislation was passed was to afford a federal right in the federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced . . ."[12] And in *Mitchum* v. *Foster*, this Court stated:

> "This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect

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> "If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—
>
> "They shall be fined not more than $5000 or imprisoned not more than ten years, or both."

Section 242 first came into law as § 2 of the Civil Rights Act, Act of April 9, 1866, 16 Stat. 140, 144. After passage of the Fourteenth Amendment, this provision was re-enacted by § 18 of the Enforcement Act of 1870. As originally enacted this section provided:

> "§ 2. *And be it further enacted*, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by a fine not exceeding one year, or both, in the discretion of the court."

12. 365 U. S. 167, 180, 81 S. Ct. 473, 481 (1961).

> those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that the failings extended to the state courts . . . The very purpose of § 1983 was to *interpose* the federal courts *between* the States and the people, as guardians of the people's rights—to *protect the people* from unconstitutional action under color of state law . . .[13] (Emphasis added.)

As opposed to standing above the states and mandating state executives to provide protection in state courts, § 1983 was to interpose the federal courts between the states and the people." placing a direct burden on the federal courts and federal authorities to provide relief in individual cases where the states had not done so. While in *Mitchum* this Court authorized injunctive relief under § 1983, only prohibitory injunctive relief against a state court proceeding has been authorized by this Court; never has this Court authorized injunctive relief to compel initiation of a state criminal proceeding because such a federal mandamus is not a remedy under the Civil Rights Act of 1871.

II.

THE STATE PROSECUTOR IS IMMUNE FROM AN INJUNCTION COMPELLING HIM TO PROSECUTE.

The Seventh Circuit held that while the defendant State's Attorney was at least partially immune from suit for damages under the Civil Rights Acts, the State's Attorney was subject to injunctive proscription. The Court reasoned that since—(A) a federal court has the power to enjoin a state prosecutor *from* instituting criminal proceedings;[14] (b) an "... affirmative injunction to require prosecution"[15]

13. 407 U. S. 225, 92 S. Ct. 2151, at 2162 (1972).

14. Ex parte Young, 209 U. S. 123 (1908); Younger v. Harris, 401 U. S. 37 (1971); Mitchum v. Foster, 407 U. S. 225, 92 S. Ct. 2151 (1972).

15. Littleton v. Berbling, 368 F. 2d 389, 411 (1972).

was impliedly authorized by the Sixth Circuit in *Peek* v. *Mitchell*;[16] and (c) plaintiff's remedy at law was inadequate, an injunction to secure ". . . prompt and effective prosecution under the criminal laws"[17] was proper. The Court recognized prosecutorial discretion, but held that "a discretionary action is subject to review and reversal for abuse of discretion."[18] In holding that injunctive relief was proper, and suggesting that "if necessary" the district court should "consider individual decisions" by the enjoined state prosecutor, the Court virtually ignored the role of the prosecutor in the administration of criminal justice, the nature of and necessity for prosecutorial discretion in the initiation of criminal proceedings, the degree to which American courts have consistently preserved such prosecutorial discretion, and the compelling need for such discretion to remain free from judicial control.

The prosecutor stands at a critical point in the American criminal justice system. He functions at the hub of the system, working directly with the police, the courts, the people.[19] The duty of the prosecutor is to "seek justice."[20] Although an advocate operating within an adversary system, he is obliged to protect the innocent as well as convict

16. 419 F. 2d 575 (6th Cir. 1970). The Sixth Circuit noted that "It is . . . apparent that the federal courts must achieve a balance between the protection of individual rights and the freedom of public officials to exercise their necessary expertise in performing their duties . . . and the courts must shield the responsible public officials against any abusive use of the civil rights legislation," and held.

17. *Supra*, note 15, at 412.

18. *Id.*, at 412.

19. See Remarks to the Law Enforcement Assistance Administration Court Specialists Throughout the United States, by Carol S. Vance, President of the National District Attorneys Association, The Prosecutor Vol. 8, No. 6.

20. ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, THE PROSECUTION FUNCTION, Section 1.1(c) (Approved Draft, 1971) [hereinafter cited as ABA STANDARDS].

the guilty, to guard the rights of the accused as well as enforce the rights of the public:[21]

> The prosecutor has a dual role which reflects in a sense the ambivalence of public attitudes on law enforcement and is the source of some difficulties. On the one hand, the prosecutor is the leader of law enforcement in the community. He is expected to participate actively in marshaling society's resources against the threat of crime. When a crisis in the enforcement of criminal law arises in the community, the public press and others clamor for a "war against crime" and he may be drawn into the maelstrom of political controversy by the demand that he "stamp out the criminals." He is called upon to make public statements, to propose legislative reforms, or to direct the energies of the law enforcement machinery of the community. On the other hand, the office demands and on sober thought the public expects, that the prosecutor will respect the rights of persons accused of crime. Our nation began with resistance to oppressive official conduct and our traditions, embodied in the national and state constitutions, demand that the prosecutor accord basic fairness to all persons. Because of the power he wields, we impose on him a special duty to protect the innocent and to safeguard the rights guaranteed to all, including those who may be guilty. The conflicting demands on a prosecutor may exert pressures on him which his sense of fairness as a lawyer rejects. Both his public responsibilities as well as his obligations as a member of the bar require that he be something more than a partisan advocate intent on winning cases.[22]

In this role as quasi-judicial "minister of justice",[23] the American prosecutor exercises a vast amount of discre-

21. ABA Code of Professional Resposibility EC 7-13 (Final Draft, 1969) [hereinafter cited as ABA Code]; United States v. Kline, 221 F. Supp. (D. Minn. 1963).

22. ABA Standards, the Prosecution Function, Introduction, p. 19.

23. See the Commentary to ABA Standards, Prosecution Function, Section 1.1.

tion.[24] The prosecutor's discretion is most pronounced with respect to the initiation and discontinuance of criminal proceedings.[25] Prosecutorial discretionary power in the initiation of criminal proceedings arises not by statute but from the common law.[26] Courts throughout the country

24. Various commentators have advanced the following definitions of "discretion" in this context: "an authority conferred by law to act in certain conditions or situations, in accordance with the official's or the official agencies' own considered judgment and conscience," La Fave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532 n.1 (1970); Professor Davis posits that a "public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action," K. DAVIS, DISCRETIONARY JUSTICE 4 (1969) [hereinafter cited as Davis]; See generally Pound, *Discretion, Dispensation and Mitigation; The Problem of the Individual Special Case*, 35 N. Y. U. L. REV. 925 (1960); Baker & DeLong, *The Prosecuting Attorney: The Process of Prosecution*, 26 J. CRIM. L. & CRIM. 647 (1935); Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U. L. REV. 174 (1965).

25. The complaint in the present case is directed against the failures of the prosecutor:

a) to *initiate* criminal proceedings when the victims are members of the plaintiffs' class;

b) to *proceed* on plaintiffs' complaints by complaint and information rather than by grand jury actions;

c) to *interrogate* properly before the grand jury;

d) to *prosecute* adequately cases involving respondents as complainants.

The Seventh Circuit has authorized injunction which would compel the state prosecutor to initiate and prosecute complaints. Considering the nature of the complaint and the Seventh Circuit holding, particular focus here will be made upon the discretion of the prosecutor in the initiation and discontinuance of criminal proceedings. Certainly the prosecutor exercises a vast amount of discretion in the manner of prosecution (i.e., order and examination of witnesses, motions, strategy, etc.) once prosecution has been initiated. The nature of and considerations underlying prosecutorial discretion in initiation and discontinuance decisions apply equally to the prosecutor's discretionary decisions throughout prosecution.

26. At Common Law the prosecuting attorney had absolute control of the criminal prosecution. See United States v. Thompson, 251 U. S. 407, 40 S. Ct. 289 (1920); Confiscation Cases, 7 Wall 454, 19 L. Ed. 196 (1868); United States v. Brokaw, 60 F. Supp. 100 (S. D. Ill. 1945); Fay v. Miller, 183 F. 2d 986 (D. C. Cir. 1950).

have consistently interpreted the common directory statutes[27] so as to permit substantial discretion to abstain from prosecution.[28] The courts have reasoned that the terms of the statutes are not to be viewed as a mandate to act against all possible offenders; that such mechanical enforcement of all criminal law would be undesirable and impractical. Underlying this reasoning is a desire for leniency in par-

27. Most statutes, such as that of Illinois simply provide that the duty of the states attorney:

> shall be (1) to commence and prosecute *all* actions, suits, indictments and prosecutions, civil and criminal, in any court of record in his country, in which the people of the state or county, may be concerned. (emphasis added)
>
> (2) To institute and prosecute all actions and proceedings in favor of or for the use of the state, which may be necessary in the execution of the duties of any state officer.
>
> (12) To attend to and perform any other duty which may, from time to time, be required of him by law. Illinois Revised Statutes, Chapter 14, § 5 (1969).

The federal rules are equally general and indefinite by defining the duties of the district attorney as simply to: "(1) prosecute for all offenses against the United States; (4) . . . unless satisfied in investigation that justice does not require the proceeding," 28 U. S. C. § 547 (1964).

28. *See generally* Annot., 155 A. L. R. 11 (1945):

> The cases passing upon this question seem to be agreed upon the proposition that a duty rests upon a district or prosecuting attorney to prosecute the violators of the criminal laws of the state whom he knows or has reason to believe to be guilty of such violations. (citations omitted). [sic] but that this duty is not absolute but qualified, requiring of him only the exercise of a sound discretion, which permits him to refrain from prosecuting, or having commenced a prosecution, to enter a nolle prosequi, whenever he, in good faith and without corrupt motives or influences, thinks that a prosecution would not serve the best interests of the state, or that, under the circumstances, a conviction could not be had, or that the guilt of the accused is doubtful or not capable of adequate proof.

See also: Nedrud, *The Role of the Prosecutor in Criminal Procedure*, 32 U. M. K. C. L. Rev. 142, at 148 (1964); LaFave, *The Prosecutor's Discretion in the United States*, 18 Am. J. Comp. L. 532 (1970) [hereinafter cited LaFave].

ticular cases,[29] a flexible procedure necessary to effectuate that end, and adherence to the theories of criminal law which are aimed to some degree at societal purposes other than crime prevention.[30] Implicit in the attitude of the courts is a basic recognition that the nature of the decision to prosecute *requires* that it be discretionary with the prosecutor for the decision to prosecute involves a delicate weighing of a myriad of subjective and objective factors:

> [D]iscretionary judgment is the product of the inevitable need for mediation between generally formulated laws and the human values contained in the varieties of particular circumstances in which the law is technically violated.[31]

The President's Commission has suggested several subjective factors that may be weighed in determining whether to decline prosecution:

(1) the seriousness of the crime;

(2) the effect upon the public sense of security and justice if the offender were to be treated without criminal conviction;

(3) the place of the case in effective law enforcement

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29. Two desires are apparent: The first is the need on the part of the public and the courts for personalized justice, "rather than literalistic adherence" to laws. L. MILLER, DOUBLE JEOPARDY AND THE FEDERAL SYSTEM, 118 (1968). See LaFave, *supra*, note 16, at 534 (1970); Silkenat, *Limitations on Prosecutor's Discretionary Power to Initiate Criminal Suits: Movement Toward a New Era*, 5 OTTAWA L. REV. 104, at 107 (1971). The second is the desire by prosecutors that their function not appear to be one of "persecutors". Ploscowe & Spiero, *The Prosecuting Attorney's Office and the Control of Organized Crime*, MANUAL FOR PROSECUTING ATTORNEYS, at 317; F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 187 (1969) [hereinafter cited as F. Miller].

30. Justice Breitel favors lenient discretion, a discretionary power which would "ameliorate or avoid the effective application of the literal criminal code." Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, at 430 (1960) [hereinafter cited as Breitel].

31. Kadish, *Legal Norm and Discretion in the Police and Sentencing Process*, 75 HARV. L. REV. 904, at 913 (1969).

policy where deterrent factors may loom large, *e.g.*, tax evasion, white collar crimes, first conviction juvenile offenses;

(4) whether the offender has medical, psychiatric, family, or vocational difficulties;

(5) whether there are agencies in the community capable of dealing with his problem;

(6) whether there is reason to believe that the offender will benefit from and cooperate with a treatment program;

(7) what the impact of criminal charges would be upon the witnesses, the offender, and his family.[32]

Objective considerations include 1) sufficiency of the evidence;[33] 2) witness availability and willingness to co-

32. PRESIDENTS COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT, 25-41 (1967) See also Cates, *Can We Ignore Laws—A Discretion Not to Prosecute*, 14 ALA. L. REV. 1 (1961).

33. The Los Angeles District Attorney compiled the following list of reasons for refraining to file a complaint:

(1) Departmental policy
(2) No Corpus Delecti
  (a) no specific intent
  (b) no criminal act
(3) No connecting evidence
  (a) a statement problem
  (b) witness problem
  (c) physical evidence problem
(4) Insufficient evidence
  (a) facts weak
  (b) evidence not available
  (c) incomplete investigation
  (d) witnesses not available
  (e) evidence inadmissible
    1. illegal detention
    2. fruit of the poisoned tree
    3. search warrant problem
    4. search & seizure problem
    5. warrant of arrest
    6. Miranda plus
(5) Lack of jurisdiction
(6) Statute of limitations

operate; 3) cooperation of the accused in the apprehension of other offenders; 4) strength of the defendants case; 5) possibility for non-criminal disposition.[34] Additionally, a

(7) Offense—misdemeanor
  (a) filed
  (b) referred
(8) Interest of justice.

See Comment, *Prosecutorial Discretion in the Initiation of Criminal Complaints*, 42 S. CAL. L. REV. 519, 531 (1969).

34. Consider also the ABA STANDARDS, PROSECUTION FUNCTION, Section 3.8, 3.9:

3.8 Discretion as to non-criminal disposition.

(a) The prosecutor should explore the availability of non-criminal disposition, including programs of rehabilitation, formal or informal, in deciding whether to press criminal charges; especially in the case of a first offender, the nature of the offense may warrant non-criminal disposition.

(b) Prosecutors should be familiar with the resources of social agencies which can assist in the evaluation of cases for diversion from the criminal process.

3.9 Discretion in the charging decision.

(a) In addressing himself to the decision whether to charge, the prosecutor should first determine whether there is evidence which would support a conviction.

(b) The prosecutor is not obliged to present all charges which evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that evidence exists which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his discretion are:

(i) the prosecutor's reasonable doubt that the accused is in fact guilty;
(ii) the extent of the harm caused by the offense;
(iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
(iv) possible improper motives of a complainant;
(v) prolonged non-enforcement of a statute, with community acquiescence;
(vi) reluctance of the victim to testify;
(vii) cooperation of the accused in the apprehension or conviction of others;
(viii) availability and likelihood of prosecution by another jurisdiction.

prosecutor's office may informally have a policy not to prosecute certain types of offenses.[35]

The decision to prosecute is necessarily an individualized decision. The facts, crime, victim and defendant vary with each and every case:

> The principle that seems to emerge . . . is that there should be a tolerably consistent pattern in serious offenses within the particular legal system. Conduct that is criminal in the eyes of the law should, where the offenses are comparable, result in prosecution or no prosecution irrespective of the locality. . . . But however strong the tendency may be to secure uniformity, a decision whether to prosecute or not has to be made on the particular facts and circumstances of the particular case.[36]

Discretion is necessary to dispose quickly of the obviously faulty case, to permit early disposition and screening of cases in which the accused is apparently innocent, or for any of the factors listed above, the case would be a waste of time to pursue. Discretion is necessary to allow the prosecutor a choice of weapons sufficiently flexible to cover any

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35. The President's Commission suggests that the following are offenses not likely to be prosecuted:

(1) domestic disturbances;

(2) assaults and petty thefts in which the victim and offender are in a family or social relationship;

(3) statutory rape when both the boy and girl are young;

(4) first offense car thefts, the "joyride";

(5) checks drawn upon insufficient funds;

(6) first offense shoplifting, particularly where restitution is made;

(7) where the criminal acts involve offenders suffering from emotional disorders short of legal insanity;

(8) cases involving annoying or offensive behavior other than a dangerous or serious crime, e.g. drunkeness, disorderly conduct, minor assault, vagrancy, and petty theft.

President's Commission, *supra*, not 19, at 5-8.

36. R. JACKSON, ENFORCING THE LAW, 53-54 (1967).

single course of conduct.[37] Even if criminal laws were drafted with exquisite specification, it would still be necessary for the prosecutor to exercise judgment. Indeed, discretion is forced upon the prosecutor for "... no prosecutor can even investigate all of the cases in which he receives complaints . . . What every prosecutor is practically required to do is select the cases for prosecution and select those which the offense is most flagrant, the public harm the greatest, and the proof the most certain."[38]

The prosecutor's decisions can only be made on a case by case basis. In this regard, his decisions are clearly distinguishable from other common decisions of public officials substantially affecting the public interest, *e.g.* decisions as to who is to have housing, who is to be employed, attend particular schools, utilize public facilities, etc. The prosecutor cannot decide in advance who is to be prosecuted. Each particular case involves the delicate weighing of numerous factors and an evaluation based upon judgment and sound discretion.

The courts have consistently refused to interfere with prosecutorial discretion in making this delicate decision.[39]

37. *See generally* Arnold, *Law Enforcement—An Attempt at Social Dissection*, 42 YALE L. J. 1 (1932); Comment, *Prosecutorial Discretion—A Re-evaluation of the Prosecutor's Unbridled Discretion and its Potential for Abuse*, 21 DEPAUL L. REV. 485 (1971).

38. PACKER, THE LIMITS OF THE CRIMINAL SANCTION, 290-91 (1968).

39. United States v. Cox, 342 F. 2d 167 (5th Cir. 1965); Powell v. Katzenbach, 359 F. 2d 234, *cert. denied* 88 S. Ct. 1341 D. C. Cir. 1965); United States v. Brokaw, 60 F. Supp. 100 (S. D. Ill. 1945); Moses v. Kennedy, 219 F. Supp. 762 (D. D. C. 1963); United States v. Woody, 2 F. 2d 262 (D. Mont. 1924); Pugach v. Klein, 193 F. Supp. 630 (S. C. N. Y. 1961); Goldberg v. Hoffman, 225 F. 2d 463 (1955); Patten v. Dennis, 134 F. 2d 137 (9th Cir. 1943); Confiscation Cases, 74 U. S. (7 Wall.) 454 (1893).

State Cases: Wilson v. County of Marshall, 257 Ill. App. 220 (1930); People v. Wabash, St. L. & P. Ry., 12 Ill. App. 263 (1883); People v. Newcomer, 284 Ill. App. 315, 120 N. E. 244 (1918); Taliaferro v. Locke, 182 Cal. App. 2d 752, 6 Cal. Rptr.

The courts have repeatedly refused to force a prosecutor to either initiate criminal proceedings,[40] continue criminal proceedings, [41] reinstate a case wherein a *nolle proseque* had been entered,[42] or charge a particular offense,[43] whatever his reasons for acting.[44]

The courts have presented sound reasons for refusing to interfere with prosecutorial discretion. Article II, Section

813 (1960); Bd. of Supervisors v. Simpson, 36 Cal. 2d 671, 227 P. 2d 14 (1951); Wilson v. Sharp, 42 Cal. 675, 268 P. 2d 1062 (1954); Leoni v. Fanelli, 194 Misc. 826, 87 N. Y. S. 2d 850 (Sup. Ct. 1949); Murphy v. Summers, 54 Tex. Crim. 369, 112 S. W. 1070 (1908); Ackerman v. Houston, 45 Ariz. 293, 43 P. 2d 194 (1935); Brack v. Wells, 184 Md. 86, 40 A. 2d 319 (1944); State ex rel. Spencer v. Criminal Court, 214 Ind. 551, 15 N. E. 2d 1020 (1938); Also *see generally* Annot. 155 ALR 11 (1945).

40. United States v. Cox, *id;* Moses v. Kennedy, *id.*, and cases cited therein.

41. Consider Petite v. United States, 361 U. S. 529 (1960) wherein this Court granted a government motion to vacate the lower court judgment and remand for dismissal based upon the "formulation and implementation of enlightened and proper prosecutorial policy." Defendant's Brief on Motion to Vacate and Dismiss, p. 3; and Redmond v. United States, 384 U. S. 264 (1966), wherein this Court again granted a government motion to vacate and dismiss based upon a Departmental policy of non-prosecution of obscenity statute violators, and the policy to act only against "strategic cases." Respondents Brief for Certiorari, pp. 3-4.

42. United States v. Brokaw, *id.*, and the case cited therein.

43. Hutcherson v. United States, 345 F. 2d 964 (D. C. Cir. 1965); *cert. denied*, 382 U. S. 894 (1965); Peek v. Mitchell, 419 F. 2d 575 (6th Cir. 1970); Newman v. United States, 382 F. 2d 479 (D. C. Cir. 1967); Powell v. Katzenbach, 359 F. 2d 234 (D. C. Cir. 1965); *cert. denied*, 384 U. S. 906 (1966); Clemone v. United States, 137 F. 2d 302 (4th Cir. 1943); Deutsch v. Aderhald, 80 F. 2d 677 (5th Cir. 1935).

44. See Pugach v. Klein, *supra* note 26; United States v. Brokaw, *supra*, note 28; Petite v. United States, *supra*, note 27.5; Redmond v. United States, *supra*, note 2715; Even where courts or statutes have required reasons for absence of prosecution or for nolle pros, the resulting judicial review in a mandamus proceeding has been a mere "formality". Comment, *Private Prosecution: A Remedy for District Attorneys Unwarranted Inaction*, 65 YALE L. J. 209, 213 (1955).

3 of the Constitution of the United States provides that "[the President] shall take care that the laws [shall] be faithfully executed." Accordingly the federal courts have always held that "The prerogative of enforcing the criminal laws was vested by the Constitution therefore, not in the Courts, nor in private citizens, but squarely in the executive arm of the government."[45] As early as *Marbury v. Madison,* [46] Mr. Chief Justice Marshall established the pattern for the relationship between the judicial and executive branches of government:

> . . . Where the head of a [executive] department acts in a case in which *executive discretion* is to be exercised . . . it is again repeated that any application to a court to *control,* in any respect, his conduct would be rejected without *hesitation.*[47] (Emphasis added.)

In the *Confiscation Cases,* this Court held that: "Public prosecutions are within the exclusive direction of the district attorney, and, even after they are entered in court, they are so far under his control that he may enter a *nolle prosequi* at any time before the jury is impaneled for the trial of the case.[48] Later cases, while all relying upon the separation of powers doctrine, have cited an equally important reason for refusing to interfere with the prosecutor. In *Pugach* v. *Klein,* the court recognized the delicate nature of the decision to prosecute:

> Surely it is for the United States Attorney to decide whether the public interest is better served by prosecuting or declining to prosecute . . . the likelihood of conviction . . . the degree of criminality, the weight of the evidence, the credibility of witnesses, precedent,

45. Pugach v. Klein, 193 F. Supp. 630, at 634 (S. D. N. Y. 1961).

46. 1 Cranch 137 (1808); See also Goldberg v. Hoffman, 225 F. 2d 463 (7th Cir. 1955).

47. *Id.,* at pages 170-171.

48. 7 Wall. 454, 19 L. Ed. 196 (1893).

> **policy, the climate of public opinion, timing, gravity of the offense . . .**
>
> **Still other factors are the relative importance of the offense compared with competing demands of other cases on the time and resources of investigation, prosecution and trial. All of these numerous other intangible and unponderable factors must be carefully weighed and considered by the United States Attorney in deciding whether or not to prosecute.**
>
> **All of these considerations point up the wisdom of vesting broad discretion in the United States Attorney. The federal courts are powerless to interfere with his discretionary power. The Court cannot compel him to prosecute a complaint or even an indictment, whatever his reasons for not acting. The remedy for dereliction of his duty lies, not with the courts, but, with the executive branch of our government and ultimately with the people.''**[49]

In *United States* v. *Cox*, the Fifth Circuit recognized that: "The executive's absolute and exclusive discretion to prosecute may be rationalized as an illustration of the doctrine of separation of powers, but it would have evolved without the doctrine and exists in countries that do not purport to accept this doctrine."[50]

The courts have carefuly preserved prosecutorial discretion even in cases where the prosecutor's *conduct* in a particular case is reviewed by the courts. Certainly a prosecutor's *conduct* in a given case has been and is subject to control by the courts. When a prosecutor withholds favorable evidence to the defense,[51] or refuses to disclose the

49. *Supra*, note 45, at 635; Later cases have strictly adhered to this view. See Moses v. Kennedy, 219 F. Supp. 762 (D. D. C. 1963); Powell v. Katzenbach, 359 F. 2d 235 (D. C. Cir. 1965) *cert. denied*, 88 S. Ct. 1341.

50. 342 F. 2d 167 (5th Cir. 1965), *cert. denied*, 85 S. Ct. 1767.

51. Brady v. Maryland, 373 U. S. 83 (1962); Giles v. Maryland, 386 U. S. 66 (1967); Miller v. Pate, 386 U. S. 1 (1967).

content of government wiretaps,[52] or engages in misconduct at trial to the prejudice of a particular defendant, his case against such defendant is dismissed or reversed on appeal. Similarly, courts are willing under certain limited circumstances, to prohibit the prosecutor, by way of injunction, from *instituting* criminal proceedings against an irreparably injured or prejudiced defendant.[53] Such prohibitory relief is in the nature of accelerated appellate review. Such review of prosecutorial misconduct or prohibitory relief, however, is not directed toward the prosecutor's discretion, but only toward his particular conduct prejudicial to a particular defendant either before or about to be brought before the court. While particular cases may be dismissed or reversed, the courts have been careful to always preserve prosecutorial discretion. The prosecutor always retains his discretion and power to refuse disclosure or engage in misconduct though his case may be dismissed or reversed as a consequence. The prosecutor's discretion is never reviewed nor divested by the courts, even though the courts may prohibit his goal—successful prosecution—as a consequence of his prejudicial action. The Court which reviews the prosecutor's conduct in these contexts does not involve a right of direct control over the prosecutor. Rather the court reviews the conduct of the courtroom or judicial process. It is the action of the trial court, not of the prosecutor that is the basic subject of review. As Chief Justice Burger recognized in *Newman* v. *United States*

> [The prosecutor] is at once an officer of the court and the attorney for a client; in the first capacity he is responsible to the Court for the *manner of his conduct of a case*, . . . but in the second capacity, as agent and attorney for the Executive, he is responsible to his

52. See Alderman v. United States, 394 U. S. 165, 89 S. Ct. 961 (1969).

53. Ex Parte Young, 209 U. S. 123 (1908); Younger v. Harris, 401 U. S. 37 (1971).

> principal and the courts have *no power over the exercise of his discretion* or his motives as they relate to the execution of his duty within the framework of his professional employment . . . The concurring opinion would reserve judicial power to review "irrational" decisions of the prosecutor. We do our assigned task of appellate review best if we stay within our own limits, recognizing that we are neither omnipotent so as to have our mandates run without limit nor omniscient so as to be able to direct all branches of government. The Constitution places on the Executive the duty to see that the "laws are faithfully executed" and the responsibility must reside with that power.[54]. (Emphasis added.)

And as succinctly stated by the Seventh Circuit in *Goldberg* v. *Hoffman*, "Discretion is always subject to abuse, but the framers of our constitution have indicated their conviction that the danger of abuse by the executive is a lesser evil than to render the acts left to executive control subject to judicial encroachment."[55]

The attitude of the courts in preserving prosecutorial discretion is well supported by the policy considerations which, in part, underlie the separation of powers doctrine. As stated in *United States* v. *Cox*, "The functions of prosecutor and judge are incompatible."[56] The prosecutor, functioning as an elected law enforcement officer and advocate for the public interest, must not only be a skilled courtroom advocate, but shrewd investigator, an efficient administrator, and a perceptive judge of the public interest he represents. To weigh competently the innumerable factors to be considered in the decision to prosecute he must have knowledge of and experience with the police, investigators, victims, defendants and witnesses as well as

54. 382 F. 2d 479, at 481, 482 n. 9 (D. C. Cir. 1967).

55. 225 F. 2d 463, 466 (7th Cir. 1955).

56. 342 F. 2d 167, 192 (5th Cir. 1965), *cert. denied*, ____ U. S. ____, 85 S. Ct. 1767.

with the courts, juries, and correctional policy and practices. Without such knowledge, experience and expertise, the public interest is compromised. The judge, functioning as "umpire" in the adversary system, has as his primary duty the interpretation and proper application of the law. While a judge may, in some cases, have general knowledge of prosecutorial policies and procedures, nothing in his judicial knowledge or experience renders him competent to weigh the factors inherent in the decision to prosecute. And his lack of "on-the-scene" participation in the basic investigation, his remoteness (in many cases) from the community and its police agencies are factors which will render him incapable of exercising a sound prosecutorial discretion. Moreover, the judge has a basic responsibility to remain neutral in the adversary process. Participation by the judge in a decision to prosecute would destroy his neutrality.[57]

The Seventh Circuit failed to consider the role of the prosecutor, the nature of and need for prosecutorial discretion, or the respect for such repeatedly asserted by the courts. Apparently the Court reasoned that either the Civil Rights Act abrogated prosecutorial immunity from the type of injunction authorized, or that the state prosecutor, in the exercise of his executive discretion, did not have the immunity from control by the federal judiciary traditionally enjoyed by the federal prosecutor.[58]

It is well established however, that the Civil Rights Acts did not abrogate the common law immunities of public

57. Consider the questions raised in Petitioner's Petition for Certiorari, p. 14.

58. The Circuit Court's repeated reference to the holding by this Court in Mitchum v. Foster, *supra*, note 1, both of these theories.

officials.[59] Moreover, as recognized in *Moses* v. *Kennedy*,[60] nothing in the legislative history of the Civil Rights Act indicates that the judiciary is to have the power to force a discretionary executive act. In *Hampton* v. *City of Chicago, Cook County, Illinois*[61] the court specifically held that the common law immunity of the States Attorney was not abrogated by the enactment of the Civil Rights Act.

Like the United States Constitution, the Illinois Constitution of 1970 divides state government into the legislative, executive and judicial branches. Article II, Section 1 specifically provides that: "The legislative, executive, and judicial branches are separate. No branch shall exercise powers properly belonging to another." Article V Section 8 provides that: "The Governor shall have the supreme executive power, and be responsible for the faithful execution of the laws." In Illinois, as in all other states, the State's Attorney is considered a member of the executive branch of government, and the powers exercised by him are executive powers. Accordingly, state courts have re-

59. In Tenney v. Brandhove, 341 U. S. 367 (1951); this Court held that the Civil Rights Act did not abrogate legislative immunity. On the basis of Bradley v. Fisher, 80 U. S. (13 Wall.) 335 (1872), and Tenney, lower courts have repeatedly held that both judicial (judges) and quasi-judicial (prosecutors) immunity remains viable under the Civil Rights Acts. Bauers v. Heisel, 361 F. 2d 581 (3rd Cir. 1966); Sires v. Cole, 320 F. 2d 877 (9th Cir. 1963); Robichaud v. Ronan, 203 F. 2d 533 (9th Cir. 1965); Fanale v. Sheehy, 385 F. 2d 866 (2nd Cir. 1967); Dacy v. New York County Lawyers Association, 423 F. 2d 188 (2nd Cir. 1969) *cert. denied*, 398 U. S. 929 (1970); United States ex rel. Rauch v. Deutsch, 465 F. 2d 130 (3rd Cir. 1972); Kostal v. Stoner, 292 F. 2d 492 (10th Cir. 1961), *cert. denied*, 369 U. S. 868 (1962); Kenny v. Fox, 232 F. 2d 288 (6th Cir. 1955), *cert. denied*, 352 U. S. 855 (1956); Eaton v. Bibb, 217 F. 2d 446 (7th Cir. 1954), *cert. denied*, 350 U. S. 915 (1955); Hampton v. City of Chicago, Cook County, Illinois, 339 F. Supp. 695 (D. C. Ill. 1972).

60. 219 F. Supp. 762 (D. D. C. 1963).

61. *Supra*, note 59; See also Arensman v. Brown, 430 F. 2d 190 (7th Cir. 1970).

fused to interfere with the discretionary decisions of the prosecutor.[62]

The rationale and policy underlying prosecutorial immunity for the federal prosecutor clearly dictates that equal immunity from federal court review and control be granted the state prosecutor. It is clear that the state prosecutor is in the same role in the criminal justice system as is the federal prosecutor, they simply prosecute different offenses. As prosecutors, both exercise the same type of executive discretion. The rationale and underlying policy asserted by the federal courts for immunizing the federal prosecutor from judicial control is the same rationale and underlying policy asserted by state courts for immunizing the state prosecutor. Given identical roles and equivalent executive discretion which is respected by courts for identical reasons, state and federal prosecutors should be equally immune from judicial control by any court. It is obvious that the discretion exercised by a state prosecutor would be as adversely affected by review and control by a federal court, as it would be by review and control by a state court. It is equally obvious that a federal judge is no more competent to make prosecutorial decisions, nor any more able to remain neutral after exercising prosecutorial discretion than is a state court judge. The executive discretion exercised by a prosecutor, whether he be a state or federal prosecutor, should not be reviewed or controlled by either state or federal courts.

The Seventh Circuit, for the first time in the history of American criminal jurisprudence, authorized an injunction to be issued by the federal court which would compel a state prosecutor to prosecute. Such an injunction would *divest* the state prosecutor of discretion which only he has exercised in the past.

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62. People v. Baron, 130 Ill. App. 2d 588, 264 N. E. 2d 423; People ex rel. Elliot v. Covelli, 415 Ill. 79, 112 N. E. 2d 156 (1953); see the state cases cited in note 39.

In *Younger* v. *Harris*, this Court spoke to the notion of "'comity', that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate ways." This Court recognized that this concept represents "a system in which there is sensitivity to the legitimate interests of both State and National Governments, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."[63] This Court has often recognized that it is of the "very essence of our federalism that the States should have the widest latitude in the administration of criminal justice."[64]

In *Fenner* v. *Boykin*, this Court stated that "Ordinarily, there should be no interference with [state prosecutors]; primarily, they are charged with the duty of prosecuting offenders against the laws of the state, *and must decide when and how* this is to be done. The accused should first set up and rely upon his defense in the state courts . . ."[65] While *Younger* authorized, under very limited circumstances, injunctive relief against state criminal prosecution, the Seventh Circuit has now authorized injunctive relief to compel state prosecution. Petitioner submits that nothing would be more harmful, more disruptive, or cause more friction in the federal-state relationship, than for this

63. 401 U. S. 37, 91 S. Ct. 750 (1971).

64. Haag v. State of New Jersey, 356 U. S. 464, 78 S. Ct. 829 (1958); Cicenia v. La Gay, 357 U. S. 504, 78 S. Ct. 1297; Knapp v. Schweitzer, 357 U. S. 371; 78 S. Ct. 1302 (1958); See also: Hurtado v. California, 110 U. S. 516, 4 S. Ct. 111 (1884); Twining v. State of New Jersey, 211 U. S. 78, 29 S. Ct. 14 (1908).

65. 271 U. S. 240, at 243-244, 46 S. Ct. 492, at 493 (1926).

Court to allow federal courts to review and control necessarily discretionary decisions of state prosecutors.

Aside from the notion of "Our Federalism," the role of the prosecutor in the criminal justice system, the nature of and need for prosecutorial discretion, and the need for such discretion to remain free from judicial control dictates that the state prosecutor continue to remain immune from an injunction compelling him to prosecute.

III.

RESPONDENTS HAVE AVAILABLE CIVIL REMEDIES AND ACCESS TO CRIMINAL PROCESS AT LAW WHICH ARE AS ADEQUATE AND MORE PREFERABLE TO THE UNDULY BURDENSOME INJUNCTION AGAINST THE STATE PROSECUTOR.

The Seventh Circuit held that "This is not a case in which it can be said that there is an adequate remedy at law and therefore there is proper basis for equitable relief . . . We . . . would retund credulity to say that a private action (for damages) is the equivalent of prompt and effective prosecution under the criminal laws . . . While, in some instances, the private damage action may have deterring effects, it seems unlikely it will obviate the necessity for a system of criminal justice."[66] The Court found other remedies either unavailable or inadequate, *e.g.* political remedies, criminal prosecution for official misconduct, private enforcement of criminal law. Lastly, the Court held that the "injunctive remedy proposed by plaintiffs . . . must be found preferable to holding that the criminal laws cannot be enforced against blacks who assault whites so long as whites are not being punished for assaults on blacks."[67]

66. Littleton v. Berbling, 468 F. 2d 389, 412 (1972).

67. *Id.*, pp. 38-39.

Respondents' numerous alternative remedies are as adequate and infinitely preferable to compelling the state prosecutor to prosecute. Both the prosecutor and the individuals he declined to prosecute may be subject to criminal liability in the federal courts for violation of respondents' civil rights.[68] No remedy is more effective against the prosecutor, for if convicted of violating plaintiffs' civil rights, the prosecutor will be automatically removed from office under Illinois law.[69]

In both state and federal courts, respondents have an action for damages against the alleged assailants who the prosecutor declined to prosecute.[70] Clearly these remedies are preferable to compelling the state prosecutor, against his judgment, to prosecute these alleged assailants in state courts.

Indeed, even the remedies the Circuit Court prohibited or deemed "less preferable" are infinitely more preferable to the remedy it authorized. Subjecting the prosecutor to liability for damages would at least confine the action to a particular dispute between the parties and not require supervision of the prosecutor. The injunction authorized,

68. 18 U. S. C. §§ 241, 242 provide adequate federal *criminal* remedies against persons acting under color of state law or individuals conspiring to deprive persons of their constitutional rights. Additionally, on the State level, the Illinois Attorney General is authorized by statute to "undertake necessary enforcement measures" for the prevention of discrimination against persons by reason of race, color, or creed. Chapt. 14, Section 9, Illinois Revised Statutes (1971). See also Doe v. Scott, 321 F. Supp. 1385 (N. D. Ill. 1971), and consider the exhaustion issue raised in the Amicus Curie Brief of Evelle J. Younger, Attorney General of the State of California, p. 11.

69. See Ill. Rev. Stat. Ch. 38, Sec. 124-2; Ill. Rev. Stat. Ch. 38, Sec. 1005-5-5 (eff. January 1, 1973); Illinois Constitution, Article XIII, Sec. 1; People ex rel. Keenen v. McGuone, 13 Ill. 2d 520, 150 N. E. 2d 168 (1958).

70. 42 U. S. C. 1985(3) and available tort remedies in state courts provide adequate civil remedies.

however, would require the federal judiciary to assume the role of the state prosecutor and subject potentially innocent third parties to federally forced state prosecution. Clearly damages are preferable to a wholesale dislocation of the historic relationship between the state and federal courts in the administration of the criminal law.

In *Yick Yo* v. *Hopkins*,[71] this Court refused to uphold a misdemeanor conviction under a municipal ordinance after a finding of discriminatory enforcement against persons of Chinese ancestry. The defense of discriminatory enforcement, assertable by persons against whom a statute is sought to be enforced, was impliedly recognized by this Court in *Ah Sin* v. *Wittman*,[72] *Edelman* v. *California*,[73] and *Oyler* v. *Boles*.[74] If there be a right to nondiscriminatory enforcement of state penal law,[75] the *Yick Yo* defense remedy is clearly preferable to an injunction compelling state prosecution. As opposed to such injunction, the *Yick Yo* remedy would preserve the necessary discretion of the state prosecutor, be less disruptive to the federal-state relationship and be potentially more effective in securing even-handed prosecution.[76]

Notwithstanding respondents' alternative legal remedies, the Seventh Circuit preferred to authorize a remedy that would clearly unduly burden both the state prosecutor and

71. 118 U. S. 356, 6 S. Ct. 1064 (1886).

72. 198 U. S. 500, 508 (1905).

73. 344 U. S. 357, 359 (1953). See brief for petitioner, pp. 6, 14-16; Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 Col. L. Rev. 1103 (1961).

74. 368 U. S. 448, 82 S. Ct. 501 (1962).

75. Many courts deny Yick Yo applicability to discriminatory penal enforcement. See Buxbom v. City of Riverside, 29 F. Supp. 3 (S. D. Cal. 1939); Sanders v. Lowrey, 58 F. 2d 158 (5th Cir. 1932); Jackie Cab Co. v. Chicago Park Dist., 366 Ill. 474, 9 N. E. 2d 213 (1937); See Comment, *id.*, at 1106.

76. It is suggested that nothing will secure non-discriminatory prosecution faster than subjecting those favored by discrimination to the experience of those disfavored.

the district court. The state prosecutor must first comply with extensive discovery procedure and defend himself in all the hearings pursuant to the desired initial decree. If the decree be issued as envisioned by the Seventh Circuit, he must then periodically report to the district court all of his previously discretionary decisions within the scope of the decree. After endless pleadings, discovery procedures and hearings in the district court as these decisions are challenged and reviewed, the prosecutor must then take whatever further action the district court desires—which again will be reviewed and the entire process repeated. Moreover, since this remedy is available, invariably other "classes" of angry citizens (*e.g.* Latins, college students, store owners, rape victims, etc.) will bring action for a similar injunction. Ultimately the state prosecutor will need a branch office at the district court solely to defend his discretionary decisions.

For the district court the burden will be even greater. Aside from the original pleadings, hearings, and orders, the initial decree, as envisioned by the Seventh Circuit, will breed an even greater number of "review" hearings, throughout which the district court judge must himself assume the role of the state prosecutor. While these hearings proceed, the district court can expect to be repeatedly challenged for its prosecutorial decisions and the actions it forces the prosecutor to take.

One can easily foresee the intense difficulties a district court will encounter. Will a potential defendant stand mute when some angry "class" of citizens is demanding his prosecution in federal court? The court may, for example, order a state prosecutor to proceed on given case because its court thinks there is enough to go to a jury. If the same kind of evidence is presented in a federal prosecution, will the court be able to hear the defendant's motion for a directed verdict with a clear, uncommitted mind? If

the court orders a state prosecutor to adopt certain practices to insure that certain cases will be well prosecuted, what posture will the court take if a convicted state court defendant challenges those practices in a federal habeas corpus proceeding? Will the state court defendant have the right to question sufficiency of evidence in state court when the federal court has already ruled on the issue? Will the state court defendant be able to argue to the jury that he is being prosecuted by order to the federal court? Will the federal court be able to inquire of grand jurors as to why they refused to indict upon a charge that the federal court has order brought? Will the federal court exercise the same control over the state grand jury that it does over the prosecutor? If the prosecutor refuses to obey a court order as to an individual case, accepts a contempt citation and appeals it, will the state statute of limitations be tolled while the appeal is being decided without violating the state court defendant's rights? What remedy will a state court defendant have if he is charged and put to trial and a federal appeals court later decides that the state prosecutor could properly have declined to proceed? Will the potential state court defendant have the right to intervene in the federal proceeding challenging the prosecutor's refusal to prosecute him? Will the federal court have to consider questions of admissibility of confessions, physical and identification evidence in determining whether a given case is a proper one on which to proceed? If the court does so what effect will its rulings have in state trial courts, on state appeal, on federal habeas corpus?

The Circuit Court considered none of these problems (and the list is not exhaustive)—it resolved the question in terms of its faith that the district court could somehow find its way through to a solution. The petitioner suggests that these problems cannot be fully solved. Even the attempt to solve them will open floodgates of pointless futile litigation.

B.

While the Seventh Circuit recognized that in Civil Rights Act cases highly specific factual averments are required to defeat a motion to dismiss (otherwise "every complaint against a State official by the simple expedient of averring conclusions would be cognizable in the federal courts."[77]), the Court found it "preferable that dismissal should be sparingly used whenever it appears that a basis for federal jurisdiction in fact exists or may exist and can be stated by plaintiff."[78] The Court later noted, however, that this was a case of "first impression as to the type of relief approved,"[79] that ". . . a prosecutor's time is necessarily limited . . .,"[80] and that there was "the possibility of substantial additional burden being placed on the federal judiciary by our decision."[81] Additionally, the Court seemed to recognize that the invidious discrimination alleged by respondents would be a difficult proposition for the respondents to prove.[82]

As against petitioner, the Courts permissive attitude toward respondents' complaint was improper for the following reason.

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77. United States ex rel. Hoge v. Bolsinger, 211 F. Supp. 199, 201 (W. D. Pa. 1962), aff'd., 311 F. 2d 215 (3rd Cir. 1962), *cert. denied*, 372 U. S. 931 (1963).

78. Littleton v. Berbling, *supra*, note 66, at 394.

79. *Id.*, at 414.

80. *Id.*, at 413.

81. *Id.*, at 415.

82. *Id.*, at 408, 414.

IV.

THE CONCLUSORY COMPLAINT DRAFTED BY ATTORNEYS IS INSUFFICIENT TO STATE A CAUSE OF ACTION AGAINST A STATE PROSECUTOR IN VIEW OF THE ABUSE POTENTIAL INHERENT IN SUCH SUITS AND THE VERY MINIMAL POSSIBILITY OF PLAINTIFFS PREVAILING.

Respondent's complaint, drafted by lawyers, alleges that the defendant state's attorney ". . . willfully and with intent to deprive plaintiff and members of their class of the benefits of the criminal justice system in Alexander County . . ." a) refuses to initiate criminal proceedings against Whites upon complaints filed by Blacks (6 examples cited); b) submits complaints filed by Blacks to a grand jury rather that proceeding by information, and then interrogates Black complainants before the grand jury with an intent to discriminate (1 example cited); c) fails to interrogate Black complainants and key witnesses before the grand jury with intent to discriminate (2 examples cited); d) inadequately prosecutes complaints filed by Blacks (no examples cited); files more serious charges against Blacks (no examples cited); requests or recommends greater bonds and sentences against Blacks (no examples cited); seeks to drop charges against Whites (1 example cited).[83]

The Seventh Circuit was satisfied that respondents complaint sufficiently alleged that the State's Attorney "handles complaints and prosecutes cases in a blatently discriminatory and arbitrary manner."[84] It is clear that the Court relied solely upon respondents' conclusory allegations, for the supporting factual examples cited by respondents are blatently insufficient to indicate any discrimination whatso-

83. Amended Complaint, par. 14 (Appendix p. 19).

84. Littleton v. Berbling, *supra*, note 66, at 411-412.

ever on the part of the State's Attorney. No examples were cited which demonstrates that the prosecution brought or was willing to bring charges against Blacks supported by the same quantum of evidence presented by White complainants. No examples were cited which in any way indicates that the prosecutor prosecuted cases involving White complainants any differently than those involving Black complainants. There are no facts pleaded which give rise to an inference of *intentional and systematic discrimination* by the state prosecutor, only facts which indicate the prosecutor refused to proceed or took certain actions on a few complaints filed by Blacks.

Conclusory allegations, unsupported by facts, have consistently been rejected as insufficient to constitute a cause of action under the Civil Rights Act.[85] Respondents failure to support factually their allegation of discrimination renders the complaint insufficient to state a cause of action against petitioner.

The policy for requiring factual support of conclusory allegations in complaints under the Civil Rights Act is well reasoned. An overly permissive attitude toward suits under the Civil Rights Act would place a heavy burden on public officials as well as subject them to abuse. Additionally and especially in suits alleging intentional discrimination, the requirements of proof are often difficult to meet. It would

85. A similarly conclusory petition was held insufficient to justify federal action in Greenwood v. Peacock, 384 U. S. 808 (1966); se also Marin v. Pinto, 463 F. 2d 583 (3rd Cir. 1972); Kauffman v. Moss, 420 F. 2d 1270 (3rd Cir. 1970) *cert. denied* 400 U. S. 846, 91 S. Ct. (1970); United States ex rel. Hoge v. Bolsinger, 311 F. 2d 215 (3rd Cir. 1962) *cert. denied* 372 U. S. 931, 83 S. Ct. 878 (1963); Ortega v. Regen, 216 F. 2d 561 (7th Cir. 1954) *cert. denied* 349 U. S. 940, 75 S. Ct. 786 (1955); Hoffman v. Halden, 268 F. 2d 280 (9th Cir. 1959); Powell v. Workman's Compensation Board of New York, 327 F. 2d 132 (2nd Cir. 1964); Johnson v. Mueller, 415 F. 2d 354 (4th Cir. 1969); Lamar v. 118th Judicial District of Texas, 440 F. 2d 383 (5th Cir. 1971); Jensen v. Olson, 353 F. 2d 825 (8th Cir. 1965).

be unwise for the courts to allow a suit to proceed without some indication that plaintiffs can prevail at trial.

The potential burden on state prosecutors and the federal courts arising from the present suit is awesome (See Argument III). The abuse potential of such suits is also great. Respondents brought a class action. While the Seventh Circuit held that "the number of suits charging discrimination against classes of citizens is not predictably substantial . . .",[86] the Court ignored the fact that class actions may be filed by innumerable civic groups seeking to compel prosecution of certain classes of offenses which they claim are being inadequately prosecuted for improper motives. Those who oppose abortion or pornography could file such suits where the prosecutor fails to act vigorously enough to please them. The criminal laws affecting landlords and their tenants many not be enforced consistently enough or well enough to suit either group and both may bring their complaints to a federal court and ask it to regulate state prosecution. Environmentalists and the industrialists will want to litigate prosecution policy in a similar fashion. The list of real or imagined grievances that a class of citizens may have against a local prosecutor for failure to bring certain charges or to prosecute them adequately is endless. And it is never difficult to allege that the prosecutor's motives are based upon racial, religious or political prejudice.[87] Lastly, considering the requirements of proof

86. Littleton v. Berbling, *supra*, note 66, at 413.

87. A permissive attitude toward development of suits like these will inevitably embroil the District Court in local political disputes to a degree we think is unacceptable. It would not be difficult for the supporters of a challenger for the prosecutor's office to file an adequate complaint and use the litigation process to harass and attack the incumbent. Each ruling of the District Court for either side during the campaign would assume substantial political significance.

that this Court[88] and lower courts[89] have established in cases alleging discriminatory enforcement of laws, it is highly improbable that respondents would prevail at trial.

Petitioner submits that the potential for undue burden and abuse inherent in the present suit, and the improbability of respondents prevailing at trial requires that the conclusory, unsupported allegations in respondent's complaint be deemed insufficient to state a cause of action against the state prosecutor.

88. Oyler v. Boles, 368 U. S. 448, 82 S. Ct. 501 (1962); Edelman v. People of the State of California, 344 U. S. 356, 73 S. Ct. 293 (1953) (dictum); Ah Sin v. Wittman, 198 U. S. 500, 506-507, 25 S. Ct. 756 (1905); Snowden v. Hughes, 321 U. S. 1, 8, 64 S. Ct. 397, 401 (1944); MacFarland v. American Sugar Refining Co., 241 U. S. 79, 86-87, 39 S. Ct. 498; Yick Yo v. Hopkins, 118 U. S. 356, 373-374, 6 S. Ct. 1064 (1886); Torrence v. State of Florida, 188 U. S. 519, 520, 23 S. Ct. 633 (....); Grundling v. City of Chicago, 177 U. S. 183, 186, 20 S. Ct. 633, 635 (1900).

89. Boynton v. Fox W. Coast Theatres Corp., 60 F. 2d 851 (10th Cir. 1932); see generally Comment, *The Right to Non-Discriminatory Enforcement of State Penal Laws*, 61 Colum. L. Rev. 1103, 1122-31 (1961).

CONCLUSION.

For the reasons given above, Petitioner urges this court to reverse the decision of the United States Court of Appeals for the Seventh Circuit, and affirm the decision of the United States District Court for the Eastern District of Illinois.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 72-953

MICHAEL O'SHEA AND DOROTHY SPOMER,
Petitioners,

vs.

EZELL LITTLETON, ET AL.,
Respondents.

No. 72-955

W. C. SPOMER,
Petitioner,

vs.

EZELL LITTLETON, ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENTS.

Respondents, individually and on behalf of the class of persons specified in the amended complaint, file this brief in response to the briefs filed on behalf of the petitioners.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Seventh Circuit is reported as *Littleton* v. *Berbling*, 468 F. 2d 389 (7th Cir. 1972). The opinion of the District Court for the Eastern District of Illinois is not reported.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 6, 1972. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1). The Petitions for a Writ of Certiorari filed by the two judges and the current state's attorney were granted on April 2, 1973. The Petitions for a Writ of Certiorari filed by the predecessor state's attorney and his investigator, No. 72-1107, have neither been denied nor granted by this Court at this time.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

The following constitutional and statutory provisions are printed at the end of this brief in the Appendix:

U. S. Const., amend. I, VIII, XIII and XIV
Ill. Const., Art. 1, § 13
28 U. S. C. § 1343
42 U. S. C. §§ 1981, 1982, 1983, 1985
Ill. Rev. Stat., ch. 14 § 1 (1971)
Ill. Rev. Stat., ch. 37 § 72.2 (1971)
Ill. Rev. Stat., ch. 38 § 112-4(a) (1971).

QUESTIONS PRESENTED.

1. Whether the amended complaint adequately states claims for equitable relief under the Civil Rights Act?

2. Whether a federal court has the authority under the Civil Rights Act to enjoin state judges and a state's attorney

from engaging in an invidious pattern and practice of racial discrimination in the administration of criminal justice?

3. Whether the doctrines of judicial and quasi-judicial immunity bar an action under the Civil Rights Act seeking equitable relief?

STATEMENT OF THE CASE.

Respondents brought this class action under 42 U. S. C. §§ 1981, 1982, 1983 and 1985 (hereinafter referred to as the "Civil Rights Act") and 28 U. S. C. § 1343(3) and (4) individually and on behalf of black persons, and white persons sympathetic to the plight of blacks, from the City of Cairo, Illinois similarly situated, against the petitioners who, as public officials administering criminal justice in Alexander County, systematically discriminate against them and members of their class on the basis of race or creed, interfering thereby with the free exercise of their constitutional rights.[1] The constitutional rights invaded are those guaranteed by the First, Eighth, Thirteenth and Fourteenth Amendments.

Petitioners Dorothy Spomer and Michael O'Shea and W. C. Spomer's predecessor in office filed motions to dismiss the amended complaint.[2] The district court on March 23, 1971 dismissed respondents' claims for injunctive relief for lack of jurisdiction and for failure to state a claim upon which relief may be granted. The Court of Appeals for the Seventh Circuit, on October 6, 1972, reversed the district court's decision and

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1. The original complaint was filed on July 23, 1970; the amended complaint was filed on October 23, 1970.

2. The original action was also brought against Peyton Berbling, then State's Attorney for Alexander County, Illinois, and Earl Shepherd, his investigator, for injunctive and other equitable relief and to recover damages. The motion of Berbling and Shepherd to dismiss the amended complaint as to them was sustained by the district court and reversed by the Seventh Circuit. A Petition for a Writ of Certiorari filed by Berbling and Shepherd is pending, unruled upon, before this Court, No. 72-1107.

remanded the case for further proceedings before a different district judge.

The petitioners are: Dorothy Spomer and Michael O'Shea, associate judges of the Circuit Court for Alexander County, and W. C. Spomer, the current state's attorney for Alexander County. W. C. Spomer was not a defendant or appellee below. Upon the expiration of the term of office of his predecessor, Peyton Berbling, who was a defendant and appellee below, W. C. Spomer substituted himself as a party pursuant to Rule 48 of the Rules of the Supreme Court of the United States.

Respondents seek equitable relief against each of the petitioners.

The named respondents, with two exceptions, are black citizens of Cairo. Two respondents are white persons who sympathize with the plight of blacks in Cairo. Respondents are financially poor persons. They filed this action on behalf of themselves and all other persons similarly situated. The class includes all those, including the named respondents, who, on account of their race or creed and because of their exercise of First Amendment rights, have been and continue to be subjected to the unconstitutional and selectively discriminatory enforcement and administration of criminal justice in Alexander County. (Paragraph 3 of the amended complaint.) The class also includes all those, including the named respondents, who, on account of their poverty, are unable to afford bail or are unable to afford counsel and jury trials in city ordinance violation cases. (Paragraph 4 of the amended complaint.)

The amended complaint alleges that since the early 1960's black persons of the City of Cairo, Illinois have been actively seeking equal opportunity and treatment in employment, housing, education and ordinary day-to-day relations with white persons and officials of Cairo. In furtherance of this equality quest, respondents and members of their class encourage others to engage in an economic boycott of local merchants who prac-

tice racial discrimination. This equality quest generated and continues to generate substantial antagonism from not only the public officials in Cairo but also from local white residents.

Spomer and O'Shea, as judges, intentionally engage in a pattern and practice of racial discrimination[3] against respondents and members of their class as follows: They set bond in criminal cases by following an unofficial bond schedule applicable to black persons without regard to the facts of the case or circumstances of an individual defendant. They sentence black persons to longer criminal terms and impose harsher conditions than they do for white persons who are charged with the same or equivalent conduct. They require black persons, when charged with violations of city ordinances, to pay for a trial by jury, yet do not require other persons to pay for a trial by jury.[4] Each practice is carried out with intent to deprive respondents and the class of the benefits of the criminal justice system and to deter them from engaging in a peaceful boycott and other activities protected by the First Amendment. (Paragraph 34 of the amended complaint, which incorporates by reference paragraphs 1-5 and 10-11, and paragraphs 35-40 of the amended complaint.)

The state's attorney intentionally engages in a pattern and practice of racial discrimination in the exercise of his office against respondents and members of their class by refusing to afford black persons an opportunity to give evidence of criminal conduct committed by white persons against black persons. He refuses to initiate criminal proceedings against white persons arising out of assaults and batteries committed by them against black persons. He refuses to proceed on black persons' com-

3. It is also alleged that their discrimination is based upon economic status. The effect insofar as the right to injunctive relief is concerned is the same as when the discrimination is based upon race. *See Boddie* v. *Connecticut,* 401 U. S. 371 (1971).

4. In Illinois, a defendant has a right to a trial by jury in such cases, even if the penalty is a fine and not a jail sentence. Ill. Const. Art. 1, § 13.

plaints by information. In some instances he declines to interrogate black complainants before a grand jury. In some instances he interrogates black persons before the grand jury in such a manner as to deprive them of their right to give evidence to the grand jury.

Among the examples described in the amended complaint of the above repeated discriminatory conduct by the state's attorney in the exercise of his office are the following:

(1) On March 28, 1969, respondent James Wilson, a black man, complained to the state's attorney that one Charlie Sullivan, a white man, assaulted Wilson with a gun in a threatening manner when Wilson attempted to move his family and household furnishings into a house adjacent to Sullivan on 22nd Street in the City of Cairo. On or about March 29, 1969, Sullivan repeatedly fired gun shots in the vicinity of Wilson's home with the intent to intimidate Wilson's family. The state's attorney, however, refused to permit Wilson to file criminal charges against Sullivan respecting either instance of Sullivan's criminal conduct.

(2) In January, 1970, the state's attorney refused to permit respondent Robert Martin, a black man, to file criminal charges against Charlie Sullivan as a result of Sullivan's attempt to run him down with a truck at a time when Martin was peacefully marching in exercise of his First Amendment rights.

(3) In June, 1970, the state's attorney refused to permit respondent Ezell Littleton, a black man, to file criminal charges against a white man who without cause or justification assaulted and battered Littleton.

(4) In June, 1970, the state's attorney refused to permit respondent, Manker Harris, a white man sympathetic to the effort of Cairo blacks, to file criminal charges against two white policemen of the City of Cairo for attempted murder and/or malicious prosecution.

(5) On August 10, 1970, the state's attorney, through his investigator Earl Shepherd, refused to permit respondent Hazel James, a black woman, to file criminal charges against one Raymond Hurst, a white man, who kicked her in the stomach while she was peacefully demonstrating against the racially discriminatory practices of merchants and local public officials.

(6) On August 8, 1970, respondent Morris Garrett, a thirteen year old boy was struck by one Tom Madra, a white man, during a demonstration against the racially discriminatory practices of merchants and local public officials. A complaint was filed which the state's attorney presented to the grand jury. The state's attorney, in interrogating Morris Garrett before the grand jury, did not question him concerning the incident of August 8, 1970, but rather asked such questions as "did you get paid for picketing?"

(7) On August 13, 1970, Jack Guetterman, Jr., a white man, fired gun shots in the vicinity of respondents Cheryl Garrett and Yvonda Taylor. Respondents Walter Garrett ("W. Garrett") and Ezell Littleton, following a telephone call from the victims, went to the scene of the shooting. Shortly thereafter, W. Garrett discussed the incident with police officers. During the discussion, Jack Guetterman, Sr., a white man, struck W. Garrett in the face, causing him to fall to the ground. W. Garrett filed a complaint which the state's attorney presented to the grand jury. W. Garrett testified before the grand jury, but was not interrogated by the state's attorney respecting the incident. Littleton, who witnessed the assault, was not called to testify.

(8) On or about August 8, 1970, Al Moss, a white man, struck respondent Curtis Johnson while Johnson demonstrated against the racially discriminatory practices of merchants and local public officials. Johnson filed a complaint which the state's attorney presented to the grand jury. The state's attorney, however, did not interrogate Johnson respecting the incident.

The state's attorney engages in the practice of recommending greater bonds and sentences in cases involving black persons than he does when the case involves white persons. He engages in a practice of bringing significantly more serious charges against black persons for conduct which would result in no charge or a minor charge against white persons.

All of the alleged practices engaged in by the state's attorney are willful and malicious. He intends to deprive respondents of their right to give evidence against those who threaten their security, peace and tranquility and to deprive respondents of their right to hold property to the same extent as is enjoyed by white persons and to deter respondents from engaging in a peaceful boycott and other activities protected by the First Amendment.

SUMMARY OF ARGUMENT.

On a motion to dismiss, the Court must construe the amended complaint liberally, considering all factual allegations to be true. Mere vagueness or lack of detail is not a ground for a motion to dismiss. Complaints need not be verified, but may be signed by an attorney, which signature constitutes his certificate that to the best of his knowledge, information and belief there is good ground to support it.

The Seventh Circuit properly held that the amended complaint states claims upon which relief may be granted. The Civil Rights Act provides a federal remedy which is supplementary to any state remedies. Exhaustion of state remedies is not a prerequisite to relief in the federal courts.

The Civil Rights Act subjects all state officials, including state judges and state's attorneys, to the equitable powers of the federal courts when they engage in an invidious pattern and practice of racial discrimination against a class of persons.

The legislative history of the Civil Rights Act clearly indicates an intent to subject judges and state's attorneys to its

command. The conduct of the petitioners is similar to the conduct of state officials subsequent to the Civil War.

The action of petitioners is state action within the meaning of the Fourteenth Amendment and is not immunized from the operation of the Constitution.

Injunctive relief would not constitute an improper intrusion into the operation of the state judiciary or state's attorney. When state officials engage in a systematic pattern of racial discrimination they act outside their judicial and quasi-judicial capacities.

The judiciary has always borne the basic responsibility for protecting individuals against unconstitutional invasions of their rights by all branches of government. To deny respondents equitable relief would strip the Civil Rights Act of its purpose.

ARGUMENT.

The very premise of our constitutional form of government provides the framework within which the issues of these cases must be analyzed. Government exists in delicate balance. In return for fulfilling his duties of citizenship, the citizen is guaranteed certain rights and the equal protection of the law. Courts, legislatures and related legal and public officials exist to protect these rights, to provide forums in which citizens may seek to bring about peaceful change, and to guarantee that the entire system will work. An integral part of peaceful intercourse is the criminal justice system. It is to the courts and quasi-judicial officials that citizens look for the implementation of the criminal justice system.

This society cannot exist as one of law and order if the instrumentalities of the state, particularly those of a criminal nature, are not utilized to benefit all persons irrespective of race. No state official has the authority to determine which laws will be enforced only for white persons and which laws

will be enforced only for black persons. The law must be enforced whether the victim is a black person or white person.

What is charged in these cases involves a fundamental breakdown in the civilized order of local government. Two local judges and the state's attorney are accused of exercising their offices to benefit only persons of the white race. In considering the facts and legal issues presented by this breakdown, it is important to view the circumstances from which this amended complaint arises.

In February, 1973, the United States Commission on Civil Rights published a report entitled "Cairo, Illinois: A Symbol of Racial Polarization." Among other things, the Commission recited the following facts: Extraordinarily grave civil rights problems have long beset the community of Cairo, Illinois. Cairo is a small town with 6,277 residents, 37.5 percent of whom are black according to the 1970 census. The median income for a white family in 1969 was $6,428, the median income for a black family was only $2,809. The unemployment rate for white males in Alexander County, according to the 1970 census, was 6.5 percent while for black males it was 16.2 percent.

In the 1960's there was considerable civil rights activity in Cairo. As a result of this equality quest, considerable tension between black and white citizens was generated. Confrontations were frequent. Gunfire became common and open violence flared. The state government investigated the crisis but failed to take affirmative action to protect the rights of black citizens.

The Commission's report found that the problems of Cairo are exacerbated by state and local governmental agencies who are reluctant to use the authority at their command to compel adherence to civil rights laws.[5] The Commission stated in its judgment:

5. United States Commission on Civil Rights, "Cairo, Illinois: A Symbol of Racial Polarization" (Feb. 1973). This report did not specifically refer to conduct of these petitioners.

> "law enforcement in Cairo has been practiced in a discriminatory and completely unprofessional manner. Basic police services have been arbitrarily denied to certain areas in the black community. Black residents have been faced with serious harassment and physical brutality by law enforcement officials. Police weapons have been used indiscriminately in an attempt to threaten the black community. And local law enforcement officials have aligned themselves with individuals and groups whose purpose is to oppose the enforcement of equal opportunity for all citizens regardless of race." *Id.* at 24.

The Commission said that "a crisis exists in Cairo, because local officials there are not fulfilling their constitutional and statutory responsibilities." *Id.* at 24.

It was against this background, that respondents filed their amended complaint against the petitioners.

I. The amended complaint adequately states claims for equitable relief under the Civil Rights Act.

The Seventh Circuit held that respondents' amended complaint adequately states claims for equitable relief under the Civil Rights Act. This Court, as did the Seventh Circuit, in reviewing the district court's dismissal of respondents' amended complaint, must construe the amended complaint liberally and consider all factual allegations to be true, resolving any doubts in respondents' favor. *See Boddie* v. *Connecticut*, 401 U. S. 371, 373 (1971). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle him to relief. *Conley* v. *Gibson*, 355 U. S. 41, 45-46 (1957); *Lucarell* v. *McNair*, 453 F. 2d 836, 838 (6th Cir. 1972); *Scher* v. *Board of Educ. of West Orange*, 424 F. 2d 741, 744 (3rd Cir. 1970).

Mere vagueness or lack of detail is not a ground for a motion to dismiss. Rule 8(f) of the Federal Rules of Civil Procedure

provides that "all pleadings shall be so construed as to do substantial justice." If they thought the amended complaint were vague, petitioners could have moved for a more definite statement, Rule 12(e), F. R. Civ. P.; 2A Moore, Federal Practice, ¶ 12.08 (1972). They did not so move.[6]

Petitioners urge that the amended complaint does not allege that any of the respondents has been a victim of their discrimination. A careful review of the amended complaint, however, refutes their contention, as noted by the court below. Paragraph 1 of the amended complaint states that respondents and members of their class have been deprived by all petitioners of certain enumerated rights guaranteed by the Constitution and laws of the United States. Paragraphs 3 and 4 state that respondents are members of the class on whose behalf the action is brought in addition to having brought the action individually and that because of their race, creed, poverty, and exercise of First Amendment rights they have been and continue to be discriminated against in the administration of criminal justice.

Paragraphs 12-17 and 19-20 state that the state's attorney's conduct deprives respondents of their constitutional rights and describe examples of his discriminatory conduct.

Paragraphs 35 and 36 state that the actions of O'Shea and Spomer, as judges, have deprived and continue to deprive respondents and members of their class of rights guaranteed by the Constitution and laws of the United States. Paragraphs 37 and 38 allege that each of the practices referred to in the amended complaint is carried out with the intent to deprive "plaintiffs and members of their class of the benefit of the

6. That the amended complaint was signed by attorneys rather than by the respondents themselves is irrelevant to a determination of its adequacy to state a claim upon which relief can be granted. Rule 11 of the Federal Rules of Civil Procedure expressly provides that complaints may be signed by attorneys and eliminates as a general rule the need to verify pleadings. The signature of an attorney constitutes a certificate by him that he has read the pleadings and that to the best of his knowledge, information, and belief there is good ground to support it. Rule 11, F. R. Civ. P.; 2A Moore, Federal Practice, ¶ 11.02 (1972).

criminal justice system of Alexander County" and that each of such practices is carried out with the "intent to deter plaintiffs and members of their class from engaging in a peaceful boycott and other activities protected by the First Amendment to the Constitution of the United States".

The amended complaint makes two essential allegations: (1) that the conduct complained of was engaged in by the petitioners under color of state law, custom and usage; and (2) that such conduct deprives respondents of rights secured by the Constitution and laws of the United States. *See Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144 (1970).

Respondents are unable to secure in the courts before Spomer and O'Shea the same enforcement of their rights which is accorded to white citizens. The amended complaint charges that Spomer and O'Shea set higher bonds in criminal cases for black persons than they do for white persons in that they follow an unofficial bond schedule which is utilized when the accused is black. They sentence black persons to longer criminal terms and impose harsher conditions than they do for white persons charged with the same or equivalent conduct. They require black persons to pay for a trial by jury in certain types of cases. *Compare Griffin* v. *State of Illinois*, 351 U. S. 12 (1956) and *Boddie* v. *Connecticut*, 401 U. S. 371 (1971). By their systematic denial of due process and equal protection of the laws, petitioners seek to chill respondents' exercise of their right to assemble peaceably and to thwart their efforts to remove the shackles of bondage. Such conduct plainly contravenes Section 1981 in that black persons are subject to a different punishment and penalty than white persons and Section 1983 in that black persons are deprived of rights secured by the First, Eighth, Thirteenth and Fourteenth Amendments. Additionally, Section 1982 is contravened in that the imposition of higher bonds and payments for jury trials prevents black persons from holding real and personal property to the same extent as white persons. Respondents thus have properly stated a claim for

equitable relief. *Compare Lane* v. *Correll*, 434 F. 2d 598 (5th Cir. 1970).

Because respondents seek freedom to exercise long-denied constitutional rights by demonstrating against local public officials and merchants on the public ways and seek to exercise everyday rights such as moving into a home, they repeatedly are victims of assaults and batteries committed by white persons. The amended complaint charges that the state's attorney, as the instrumentality of the State, knowing of this criminal violence, makes no effort to bring the guilty to punishment nor to afford protection or redress to the outraged and innocent victims. The state's attorney is unwilling to enforce state criminal laws when the victims are black and the accused are white. He consistently and repeatedly refuses to take evidence of such criminal conduct in that he turns a deaf ear to the complaints of blacks; he refuses to investigate such complaints; he refuses to initiate criminal proceedings against such persons; he refuses to present appropriate evidence before the grand jury, although by statute, the grand jury must hear all such evidence. Ill. Rev. Stat., ch. 38, § 112-4(a) (1971). Immunity has and continues to be given to crime so long as the victim is black or one sympathetic to the injustices and inhumanity to which blacks are subjected. By such conduct, the state's attorney seeks to chill respondents' exercise of their right to assemble peaceably.

This systematic discrimination, because of respondents' race or creed, clearly deprives respondents of due process and equal protection of the laws. The state's attorney's conduct plainly contravenes Section 1981 in that black persons are not permitted to give evidence to the same extent as whites and are deprived of the full and equal benefit of all proceedings affecting their security of person and property. Section 1983 is contravened in that the state's attorney's exercise of his office intimidates respondents from exercising First Amendment rights, denies respondents due process of law and the equal protection of the laws, and deprives respondents of the right to be free

from the vestiges of slavery. The state's attorney's refusal to take evidence to initiate criminal proceedings, for example, against Charlie Sullivan when Sullivan fired gunshots and otherwise intimidated respondent Wilson's family when Wilson moved into a home in a white neighborhood in the City of Cairo, caused Wilson to be deprived of the right to hold real property to the same extent as white citizens in contravention of Section 1982. *Compare Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968). Additionally, the state's attorney's refusal to recommend bond and sentences without regard to race or creed causes respondents to be deprived of their right to hold real and personal property to the same extent as white citizens in that respondents are required to pay greater sums than whites in posting bond or paying fines.

II. The doctrines of judicial and quasi-judicial immunity do not insulate state judges or state's attorneys from the equitable powers of the federal courts when they engage in an invidious pattern and practice of racial discrimination in the administration of criminal justice.

State judges and a state's attorney are not immune from the equitable powers of a federal court when they denigrate their offices by engaging in an invidious pattern and practice of racial discrimination in the administration of criminal justice. The civil rights statutes, enacted to implement the Thirteenth and Fourteenth Amendments, express congressional determination to eradicate the vestiges of slavery from American society and to guarantee equal protection of the law to all. They provide a mechanism whereby the federal system may affirmatively intervene when a citizen is deprived of rights guaranteed to all, irrespective of race. *See Bell* v. *Hood*, 327 U. S. 678 (1946); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968); *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965). Exhaustion of state remedies is not a prerequisite. *McNeese* v. *Board of Educ.*, 373 U. S. 668 (1963); *Carter* v. *Stanton*, 405

U. S. 669 (1972); *Monroe* v. *Pape*, 365 U. S. 167 (1961). No person, irrespective of his official position, may, by design or otherwise, subject a citizen to a deprivation of any rights secured by the Constitution or laws of the United States. *See Dombrowski* v. *Pfister, supra; Hague* v. *Committee for Industrial Organization*, 307 U. S. 496 (1939). The fact that the petitioners are two judges and a state's attorney does not relieve them of their fealty to the Constitution and laws of the United States. *United States* v. *McLeod*, 385 F. 2d 734, 738 n. 3 (5th Cir. 1967); Ill. Rev. Stat., ch. 14, § 1 (1971); Ill. Rev. Stat., ch. 37, § 72.2 (1971). The petitioners stand in this litigation as instrumentalities of the State. *Cooper* v. *Aaron*, 358 U. S. 1, 16-18 (1958); *M. Schandler Bottling Co.* v. *Welch*, 42 F. 561 (Cir. Ct., D. Kan. 1890).

A. The legislative history of the Civil Rights Act reflects a congressional intent that state judges and state's attorneys be subject to its command.

The legislative history of the Civil Rights Act was thoroughly analyzed in the opinion of the Seventh Circuit and will not be repeated here in its entirety. The capricious conduct of these petitioners was precisely that which was sought to be cured by the Thirteenth and Fourteenth Amendments and the Civil Rights Act. Sections 1981 and 1982 were enacted as a means of enforcing the Thirteenth Amendment's proclamation that "[n]either slavery nor involuntary servitude . . . shall exist within the United States." The Thirteenth Amendment "is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." The power vested in Congress to enforce this Amendment, therefore, must and does include the power to enact laws of nationwide application. *See Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968); *Griffin* v. *Breckenridge*, 403 U. S. 88, 105 (1971).

Prior to the enactment of Sections 1981 and 1982, Black Codes were adopted throughout the southern states, which, while admitting that Negroes were no longer slaves, nonetheless used the state's power to impose and maintain essentially the same inferior, servile position which Negroes had occupied prior to the abolition of slavery. One example of the convergence of the history of the Act and the amended complaint herein, is the prohibition by the Black Codes (similar to the conduct of the state's attorney here) of Negroes' testimony in a court against any white man. *See* Senator Wilson's speech before Congress, *Cong. Globe*, 39th Cong., 1st Sess. 39-40, 589 (1866); 1 Fleming, *Documentary History of Reconstruction* 273-312 (1906); McPherson, *The Political History of the United States During the Period of Reconstruction*, 29-44 (1880).

Section 1983 has its roots in Section 1 of the Ku Klux Klan Act of 1871, Act of April 20, 1871, c. 22, § 1, 17 Stat. 13. Its primary purpose was to enforce the Fourteenth Amendment. At the time of its enactment, state and local governments were not controlling the wave of murders and assaults launched against blacks by whites. Section 1 of the Act was designed in response to the unwillingess or inability of the state governments to enforce their own laws against those violating the civil rights of others.[7] The remedy created in § 1 "was not a remedy against [the Klan] or its members but against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law." *Monroe* v. *Pape*, 365 U. S. 167, 175-76 (1961); *District of Columbia* v. *Carter*, ... U. S. ...., 93 S. Ct. 602, 607 (1973). In the final analysis, § 1 of the 1871 Act may be viewed as an effort

> "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or other-

7. The Act, moreover, was designed to protect that class of white persons who had Union sympathies. See *Littleton* v. *Berbling*, 468 F. 2d 389, 400 (7th Cir. 1972). Similarly, here, respondents charge that petitioners discriminate against a class of white persons who sympathize with the plight of blacks in Cairo.

> wise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Monroe* v. *Pape*, 365 U. S. 167, 180 (1961).

Respondents' cause of action against Spomer and O'Shea prays for equitable relief. All that is asked is that these two petitioners be directed to set bond in criminal cases, to impose criminal sentences, and to provide trials by jury in all cases in a nondiscriminatory manner without regard to race or creed.

The discriminatory conduct of Spomer and O'Shea is precisely the kind of conduct against which the Civil Rights Act is directed. In the congressional debates, as quoted by this Court in *Monroe* v. *Pape*, *supra*, Mr. Burchard of the State of Illinois said:

> "[I]f the [state's] statutes show no discrimination, *yet in its judicial tribunals one class is unable to secure that enforcement of their rights and punishment for their infraction which is accorded to another*, or if secret combinations of men are allowed by the Executive to band together to deprive one class of citizens of their legal rights without a proper effort to discover, detect, and punish the violations of law and order, *the State has not afforded to all its citizens the equal protection of the laws.*" (Emphasis added.) *Id.* at 176-77.

With respect to the state's attorney, respondents charge that he refuses to permit them to give evidence of criminal conduct of white persons against black victims, to initiate criminal proceedings against white persons who commit criminal conduct against them, to present evidence to the grand jury and to recommend bond and sentences in a nondiscriminatory manner without regard to race or creed.

The framers of the Civil Rights Act recognized that the agents of the State charged with the responsibility for prosecuting the criminally accused on behalf of the people might be derelict in

their duties when the victims were black and therefore designed the Civil Rights Act to rectify such an evil. In the congressional debates, as quoted by this Court in *Monroe* v. *Pape*, 365 U. S. 167 (1961), Senator Sherman of Ohio said:

> ". . . it is said that the reason is that any offense may be committed upon a negro by a white man, and a negro cannot testify in any case against a white man, so that the only way by which any conviction can be had in Kentucky in those cases is in the United States courts, because the United States courts enforce the United States laws by which negroes may testify." *Id.* at 173-74.

This Court, moreover, stated that the purposes of the Civil Rights Act were broad—that the aim

> "was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."
>
> ". . . It was not the unavailability of state remedies but the *failure of certain States to enforce the laws with an equal hand* that furnished the powerful momentum behind this 'force bill.' (Emphasis added.) Mr. Lowe of Kansas said:
>
> > 'While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice. Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress.'
>
> "Mr. Beatty of Ohio summarized in the House the case for the bill when he said:
>
> > '. . . certain States have denied to persons within their jurisdiction the equal protection of the laws. The proof on this point is voluminous and unquestionable. . . . [M]en were murdered, houses were burned, women were outraged, men were scourged,

> and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of the law to these persons.' " *Id.* at 174-75.

This Court continued:

> "While one main scourge of the evil—perhaps the leading one—was the Ku Klux Klan, the remedy created was not a remedy against it or its members but against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law."
>
> * * * * *
>
> "There was, it was said, no quarrel with the state laws on the books. It was their lack of enforcement that was the nub of the difficulty." *Id.* at 175-76.

B. Decisions of this Court hold that no state official, in the exercise of his office, may discriminate on the basis of race against a class of persons.

Action of state courts and quasi-judicial officers in their official capacities has long been regarded as state action within the meaning of the Fourteenth Amendment and subject to the equitable powers of the federal courts. State judicial and quasi-judicial action is not immunized from the operation of the Constitution and Civil Rights Act simply because it is that of the judicial or executive branches of the state government. *See Shelley* v. *Kraemer*, 334 U. S. 1 (1948) and cases discussed therein by Mr. Justice Vinson; *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965). Indeed, in 1880 this Court stated in *Ex parte Virginia*, 100 U. S. 339, 25 L. Ed. 676, 679 (1880):

> "A State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public

> position under a state government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it." *Id.*

In *Mitchum* v. *Foster*, 407 U. S. 225, 92 S. Ct. 2151, 2160-62 (1972), this Court stated that the Civil Rights Act fundamentally altered the federal system. As a result of the constitutional amendments and statutes passed subsequent to the Civil War,

> "the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established. . . . Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation."
>
> "It is clear from the legislative debates surrounding passage of § 1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment 'against state action, whether that action be executive, legislative, or *judicial*.' " (Emphasis in original.)
>
> . . .
>
> "[C]ongress plainly authorized the federal courts to issue injunctions."

In *Cooper* v. *Aaron*, 358 U. S. 1, 17 (1958), this Court stated:

> "In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the Brown case can neither be nullified openly and directly by *state legislators or state executives or judicial officers*, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.' " (Emphasis added.)

The Seventh Circuit decision in the present case is consistent with decisions of the Fifth Circuit, which has grappled, perhaps, more than most circuits with the problems of discriminatory conduct of state officials. *E.g., Machesky* v. *Bizzell,* 414 F. 2d 283 (5th Cir. 1969); *Shaw* v. *Garrison,* 467 F. 2d 113 (5th Cir. 1972); *Sheridan* v. *Garrison,* 415 F. 2d 699 (5th Cir. 1969), *cert. denied,* 396 U. S. 1040 (1970); *Phillips* v. *Cole,* 298 F. Supp. 1049 (N. D. Miss. 1968); *Bramlett* v. *Peterson,* 307 F. Supp. 1311, 1321-22 (M. D. Fla. 1969).

The decision of the Seventh Circuit is not in conflict with this Court's decision in *Pierson* v. *Ray,* 386 U. S. 547 (1967). In *Pierson,* the Court was concerned with an action for damages, not one for equitable relief, against a state judge. Moreover, the record in *Pierson,* unlike here, was "barren of any proof or specific allegation that Judge Spencer played any role in these arrests and convictions other than to adjudge petitioners when their cases came before this Court." *Id.* 553. In the subject case it is alleged that the petitioners are engaging in a pattern and practice of racial discrimination and that they are not merely exercising discretion within the bounds of the Constitution and laws of the United States.

Petitioners' reliance upon *Bradley* v. *Fisher,* 80 U. S. (13 Wall.) 335 (1872), is misplaced. *Bradley* was a common law action for damages by an attorney whose name was stricken from the role of attorneys as a result of remarks he made in the course of a trial. It was not an action in equity; it was not an action under the Civil Rights Act; it was not a case where the judge systematically engaged in a pattern and practice of racial discrimination against an entire class of persons. Petitioners, however, argue that the sanctions of contempt are as dangerous to judicial independence as the risk of a suit for damages. That argument assumes that the petitioners will defy an order of a federal court not to discriminate in the exercise of public office upon the basis of race. If that assumption were valid, then such would be all the more reason for the intervention of a federal court to protect the rights of citizens.

Tenney v. *Brandhove*, 341 U. S. 367 (1951), reversing 183 F. 2d 121 (9th Cir. 1950), does not stand for the principle that state legislators, and by analogy state judges and state's attorneys, are immune from the equitable powers of the federal courts when such persons engage in a systematic pattern and practice of racial discrimination against black persons. *Compare Hague* v. *Committee for Industrial Organization*, 307 U. S. 496 (1939). *Tenney* was an action to recover damages for alleged civil rights violations against a single individual; equitable relief was not sought. That decision, moreover, expressly limited itself to the facts of that case. The Court stated:

> "It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character for which the members who take part in the act may be held responsible." *Id.* at 378-79.

Subsequent to *Tenney*, this Court, in, for example, reapportionment and voting rights cases, has clearly established that such officials may be enjoined from racially discriminatory conduct, and, indeed, be required to rectify affirmatively the wrong caused by their conduct. *E.g.*, *Reynolds* v. *Sims*, 377 U. S. 533 (1964); *cf. Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960); *United States* v. *Raines*, 362 U. S. 17 (1960); *Baker* v. *Carr*, 369 U. S. 186 (1962). *See also Jordan* v. *Hutcheson*, 323 F. 2d 597, 601-02 (4th Cir. 1963) and cases cited therein.

This is not a case in which injunctive relief would constitute an unwarranted intrusion into the operation of the state judiciary or office of state's attorney. A federal district court is not being asked merely to substitute its judgment for the judgment of state judges and a state's attorney arising out of discretionary action in an isolated case by a disgruntled litigant. A federal district court is not being asked to enjoin pending state criminal prosecutions. Rather, because the petitioners, as judges and as a state's attorney, abuse their official positions to engage systematically in a pattern of discrimination whereby persons because of their race or creed are treated in a manner different from others, a federal

court is being asked to intervene. Federal respect for state institutions does not provide a shield for such pervasive invasions of citizens' constitutional rights. *Compare Jordan* v. *Hutcheson*, 323 F. 2d 597 (4th Cir. 1963).

C. Petitioners' contentions that a federal court should not infringe upon the discretion of state judges and state's attorneys are inapplicable to the circumstances of this case.

When state officials pervert their office by acting in a fashion in violation of the Constitution and laws of the United States, they have acted outside their judicial and quasi-judicial capacities and may be enjoined by a federal court. The exclusion of black persons from the benefits of citizenship is not within the limits of their discretion. *Cf. Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 151-2 (1970); *Ex parte Virginia*, 100 U. S. 339 (1880). As Judge Pell stated for the court below:

> "The word discretion is limited by the duty to follow the law and such a blanket pattern of discrimination as is here alleged cannot be said to conform to such a duty. A discretionary action is subject to review and reversal for abuse of discretion. 'And by abuse of discretion is meant action which is arbitrary, fanciful, or clearly unreasonable.' *United States* v. *McWilliams*, 163 F. 2d 695, 697 (D. C. Cir. 1947). For us to find that the acts and failures to act alleged in the complaint do not constitute an abuse of discretion, we would have to say that they do not constitute 'arbitrary action.' *Burns* v. *United States*, 287 U. S. 216, 223 (1932), and this we can only do by ignoring the mandates of equal protection of the laws." *Littleton* v. *Berbling*, 468 F. 2d 389, 412 (7th Cir. 1972).

In *Osborn* v. *Bank of the United States*, 22 U. S. (9 Wheat.) 738, 866 (1824), Chief Justice Marshall stated:

> "Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is

discerned, it is the *duty* of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law." (Emphasis added.)

The allegations relating to the conduct of the state's attorney do not relate to that prosecutorial discretion which would apply to an individual case. The state's attorney is charged with refusing to take complaints from black persons, with refusing to investigate criminal conduct of whites against blacks, with refusing to present evidence of such criminal conduct to the grand jury, and with refusing to recommend bail and sentence without regard to race. When he thereby deprives respondents of the opportunity of access to the judicial system, he stands in no different a position than the prison warden who deprives a prisoner access to the courts or the police officer who unlawfully carries out an investigation. *Compare Johnson* v. *Avery*, 393 U. S. 483 (1969); *Monroe* v. *Pape*, 365 U. S. 167 (1961); *Lankford* v. *Gelston*, 364 F. 2d 197 (4th Cir. 1966); *Schnell* v. *City of Chicago*, 407 F. 2d 1084 (7th Cir. 1969); *Lewis* v. *Kugler*, 446 F. 2d 1343 (3rd Cir. 1971).

Petitioners argue that there are alternative remedies so preferable to equitable relief that this action should be dismissed. They argue that an action for damages is preferable. *Pierson* v. *Ray*, 386 U. S. 547 (1967), however, precludes an action for damages against state judges. Petitioner W. C. Spomer, the current state's attorney, suggests that an action in damages against a state's attorney is preferable to equitable relief. The Seventh Circuit, however, held that only when a state's attorney improperly exercises his investigatory functions may an action for damages be brought. This Court, moreover, has never decided that question. Indeed, the issue raised in *Berbling* v. *Littleton*, No. 72-1107, pending before this Court is whether or not an action for damages may be brought against a state's attorney. Spomer's predecessor in that petition argues that one

may not be brought. An action at law, moreover, is plainly inadequate where respondents suffer continuous deprivation of their rights. The possibility of piecemeal after-the-fact damage suits will not necessarily deter the type of discrimination alleged here. In addition, undue burdens would be imposed upon the district court to decide multiple lawsuits.

Nor is the ballot box adequate. As the Seventh Circuit noted at page 413 of its opinion:

> "Cairo, Illinois, has admittedly been the scene of substantial civil rights agitation for the last several years. Not surprisingly there has been a polarization of the community, and, in such a case, it would be totally presumptuous of this court to find that the ballot provides even a probability of remedying the alleged oppression of the minority by the duly elected representatives of the majority. It was, in fact, just such oppression which caused the Congress to enact the provisions with which we now deal."

The remedy of criminal prosecution of petitioners for their misconduct is not adequate. As the Seventh Circuit noted at page 413 of its opinion:

> "Such remedies are merely nominal. The criminal sanctions can rarely be invoked to control the errant police officer, the errant prosecutor, and never the oppressive judge. The civil damage suit is worthless, especially if the victim of oppression is a social misfit or an unsavory character." Breitel, *Controls in Criminal Law Enforcement*, 27 U. Chi. L. Rev. 427, 434 (1960).

There is no private enforcement of criminal laws in Illinois.

The amended complaint meets not only the standards for federal involvement under *Mitchum* v. *Foster*, 407 U. S. 225 (1972), but also those espoused in *Younger* v. *Harris*, 401 U. S. 37 (1971), and its companion cases. *See also Hadnott* v. *Amos*, 393 U. S. 815 (1968) and *Hadnott* v. *Amos*, 394 U. S. 358 (1969).

That the federal courts may require state officials to take affirmative action, if necessary, is not without precedent. *See Louisiana* v. *United States*, 380 U. S. 145 (1965); *Reynolds* v. *Sims*, 377 U. S. 533 (1964). This is most emphatically reflected in school desegregation cases. As a result of *Brown II*, the State automatically assumed an affirmative duty "to effectuate a transition to a racially nondiscriminatory school system." *Brown* v. *Board of Educ.*, 349 U. S. 294, 301 (1955); *see also Swann* v. *Charlotte-Mecklenburg Board of Educ.*, 402 U. S. 1, 15 (1971). *Brown II* did not merely prohibit discrimination. The type of relief sought here would not require, however, reallocation of state resources, restructuring of political boundaries or the construction of new facilities as required in those cases. *See, e.g., Keyes* v. *School District No. 1, Denver, Colo.*, ... U. S. ...., 41 U. S. L. W. 5002, 5009, 5017 (June 21, 1973). The relief suggested by the Seventh Circuit, assuming respondents prove their charges, is more in the nature of a reporting system to assure that racial discrimination is not pervasive in the administration of criminal justice. *Compare Louisiana* v. *United States*, 380 U. S. 145 (1965).

In sum, courts are the central dispute-settling institutions in our society. They are bound to do equal justice under law, to black and white, to rich and poor. They fail to perform their function in accordance with the Equal Protection Clause if they shut their doors to blacks or indigents altogether. Where race determines whether criminal conduct shall be punished or money determines the kind of a trial a man gets or race determines whether he gets into court at all, the great principle of equal protection becomes a mockery.

CONCLUSION.

For the foregoing reasons, respondents urge the Court to affirm the decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A.

U. S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U. S. Const. amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

U. S. Const. amend. XIII:

> SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

U. S. Const. amend. XIV.

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * * * *
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 U. S. C. § 1343:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * * * *
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U. S. C. § 1981:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white persons, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U. S. C. § 1982:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U. S. C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at lawsuit in equity, or other proper proceeding for redress.

42 U. S. C. § 1985:

§ 1985(2) ". . . or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) If two or more persons in any State or Territory conspire or go in disguise on the highways or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

Ill. Const., Art. 1, § 13:

The right of trial by jury as heretofore enjoyed shall remain inviolate.

Ill. Rev. Stat., ch. 14 § 1:

Before entering upon the respective duties of their office, the attorney general and state's attorneys shall each be commissioned by the governor, and shall take the following oath or affirmation:

I do solemnly swear (or affirm, as the case may be), that I will support the constitution of the United States and the constitution of the state of Illinois, and that I will faithfully discharge the duties of the office of attorney general (or state's attorney, as the case may be), according to the best of my ability.

Ill. Rev. Stat., ch. 37 § 72.2:

. . . The several judges of the circuit courts of this State, before entering upon the duties of their office, shall take and subscribe the following oath or affirmation, which shall be filed in the office of the Secretary of State:

I do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States, and the Constitution of the State of Illinois, and that I will faithfully discharge the duties of judge of ..... court, according to the best of my ability.

Ill. Rev. Stat., ch. 38 § 112-4(a):

The Grand Jury shall hear all evidence presented by the State's Attorney.

SPOMER, STATE'S ATTORNEY OF ALEXANDER COUNTY, ILLINOIS *v.* LITTLETON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 72-955. Argued October 17, 1973—Decided January 15, 1974

Respondents, 17 black and two white residents of Cairo, Illinois, brought a civil rights class action against the then State's Attorney of Alexander County, Illinois, individually and in his official capacity, charging him with certain purposeful racial discrimination practices, under color of state law, in violation of the Constitution and 42 U. S. C. §§ 1981–1983, 1985. The District Court dismissed the complaint for want of jurisdiction to grant injunctive relief. The Court of Appeals reversed, holding that a prosecutor's quasi-judicial immunity from injunctive proscription was not absolute, and that since respondents' remedies at law were inadequate, an injunctive remedy might be available if respondents could prove their claims. Subsequent to the Court of Appeals' decision, petitioner was elected as successor State's Attorney, and in the petition for certiorari filed with this Court was substituted as a party. *Held:* Where, on the record, respondents have never charged petitioner with anything and do not presently seek to enjoin him from doing anything, so that there may no longer be a controversy between respondents and any Alexander County State's Attorney concerning injunctive relief to be applied *in futuro*, the case is vacated and remanded to the Court of Appeals for a determination, in the first instance, of whether the former dispute is now moot and whether respondents will want to, and should be permitted to, amend their complaint to include claims for relief against petitioner. Pp. 520–523.

468 F. 2d 389, vacated and remanded.

WHITE, J., delivered the opinion for a unanimous Court.

James B. Zagel argued the cause for petitioner. With him on the brief was *Patrick F. Healy.*

Alan M. Wiseman argued the cause for respond-

ents. With him on the brief were *James B. O'Shaughnessy* and *Michael P. Seng.**

MR. JUSTICE WHITE delivered the opinion of the Court.

This is a companion case to *O'Shea* v. *Littleton*, *ante*, p. 488, involving claims which the respondents, 17 black and two white residents of Cairo, Illinois, individually and as representatives of the class they purport to represent, set forth in that portion of their amended civil rights complaint which alleged wrongful conduct on the part of Peyton Berbling, individually and in his capacity as State's Attorney for Alexander County, Illinois, the county in which the city of Cairo is located. As discussed in *O'Shea*, the complaint alleged a broad range of racially discriminatory patterns and practices in the administration of the criminal justice system in Alexander County by the Police Commissioner of Cairo, Magistrate Michael O'Shea and Associate Judge Dorothy Spomer of the Alexander County Circuit Court, State's Attorney Berbling, and Earl Shepherd, an investigator for Berbling. Allegedly, a decade of active, but lawful, efforts to achieve racial equality for the black residents of Cairo had resulted in continuing intentional conduct on the part of those named as defendants in the complaint to deprive the plaintiff-respondents of the even-handed protection of the criminal laws, in violation of various amendments to the Constitution and 42 U. S. C. §§ 1981, 1982, 1983, and 1985.

*Briefs of *amici curiae* urging reversal were filed by *Evelle J. Younger*, Attorney General, *Edward A. Hinz, Jr.*, Chief Assistant Attorney General, *Doris H. Maier* and *Edward P. O'Brien*, Assistant Attorneys General, and *Robert R. Granucci*, Deputy Attorney General, for the State of California; and by *Joseph P. Busch* for the District Attorney of Los Angeles County.

In particular, the complaint charged State's Attorney Berbling with purposeful racial discrimination, under color of state law, by neglecting to provide for respondents' safety though knowing of the possibility of racial disorders, by refusing to prosecute persons who threaten respondents' safety and property, and by refusing to permit respondents to give evidence against white persons who threaten them. It was alleged, with particular incidents recounted as to some charges, that "Berbling has denied and continues to deny" the constitutional rights of respondents and members of their class by following the practices of (a) refusing to initiate criminal proceedings and to hear criminal charges against white persons upon complaint by members of respondents' class,[1]

[1] Specific examples of Berbling's practice were alleged as follows:

"(1) On March 28, 1969, defendant refused to permit James Wilson to file criminal charges against Charlie Sullivan, a white man, who pointed a gun at him as he (Wilson) attempted to move into the house next door to Charlie Sullivan on 22nd Street, in Cairo, Illinois. Sullivan threatened Wilson with the gun and told him to move the truck containing household furnishings and leave the area, thereby attempting to prevent James Wilson from holding property.

"(2) On or about March 29, 1969, defendant refused to permit James Wilson to file criminal charges against Charlie Sullivan who fired shots from a gun around James Wilson's home to intimidate his family in order to prevent James Wilson from holding property.

"(3) In January, 1970, defendant refused to permit Robert Martin to file charges against Charlie Sullivan, who tried to run him down in a truck while peacefully marching in exercise of his First Amendment rights.

"(4) In June, 1970, defendant refused to permit Ezell Littleton to file charges against a white man who without cause or justification assaulted and battered him.

"(5) In June, 1970, defendant refused to permit Rev. Manker Harris to file charges against two white policemen of the City of Cairo for attempted murder and/or malicious prosecution.

"(6) On August 10, 1970, defendant Berbling, through a subordinate, defendant Earl Shepherd, refused to permit plaintiff Hazel

(b) submitting misdemeanor complaints which have been filed by black persons against whites to a grand jury, rather than proceeding by information or complaint, and then either interrogating witnesses and complainants before the grand jury with purposeful intent to racially discriminate,[2] or failing to interrogate them at all,[3] (c) in-

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James to file criminal charges against Raymond Hurst, a white man, who had kicked plaintiff James in the stomach while she was peacefully demonstrating against the racially discriminatory practices of merchants and of public officials of the City of Cairo.

"(7) In May, 1969, Plaintiff Ewing and eight others could have [brought] and desired to bring criminal charges against a white man who threatened them with a shotgun, but did not because they knew of defendant's practice of refusing to take complaints and were discouraged from making useless gestures."

[2] Cited in support of this allegation was an incident when "Morris Garrett (a 13 year old boy), on August 8, 1970, during a demonstration against the racially discriminatory practices of merchants and public officials of the City of Cairo, was struck by one Tom Madra. A complaint was filed which was presented to the grand jury. Morris Garrett appeared before the grand jury. Defendant Berbling, rather than question him regarding the incident, asked him such questions as 'did you get paid for picketing?' A no-true bill was returned by the grand jury."

[3] Two episodes of this type were described:

"(1) On August 13, 1970, Cheryl Garrett and Yvonda Taylor, ages 18 and 16 respectively, were shot at by one Jack Guetterman, Jr. Rev. Walter Garrett and Ezell Littleton, following a telephone call from the young girls, went to the scene of the shooting. Shortly thereafter police officers arrived. While Rev. Walter Garrett was discussing the situation with one police officer, one Jack Guetterman, Sr. struck Rev. Garrett in the face, causing him to fall to the ground. A complaint was filed by Rev. Walter Garrett respecting this incident. Defendant Berbling presented the complaint to the grand jury, but Rev. Garrett was not interrogated at all respecting the incident. Ezell Littleton, who witnessed the assault, was not called to testify.

"(2) On or about August 8, 1970, Curtis Johnson was struck by one Al Moss while demonstrating against the racially discriminatory practices of merchants and public officials of the City of Cairo.

adequately prosecuting the few criminal proceedings instituted against whites at respondents' behest in order to lose the cases or settle them on terms more favorable than those brought against blacks, (d) recommending substantially greater bonds and sentences in cases involving respondents and members of their class than for cases involving whites, (e) charging respondents and members of their class with significantly more serious charges for conduct which would result in no charge or a minor charge against a white person, and (f) depriving respondents of their right to give evidence concerning the security of members of their class.[4] Each of these practices was alleged to be willful, malicious, and carried out with intent to deprive respondents and members of their class of the benefits of the county criminal justice system and to deter them from peacefully boycotting or otherwise engaging in protected First Amendment activity. Since there was asserted to be no adequate remedy at law, respondents requested that Berbling be enjoined from continuing these practices, that he be required to "submit a monthly report to [the District Court] concerning the nature, status and disposition of any complaint brought to him by plaintiffs or members of their class, or by white persons against plaintiffs or members of their class," and that the District Court maintain continuing jurisdiction in this action.[5]

A complaint was filed, which was presented to the grand jury. Curtis Johnson, however, was not interrogated by defendant Berbling respecting the incident."

[4] Thus, respondents alleged that Berbling sought the "dropping of a criminal charge arising out of a complaint filed by Frank Hollis, a black person, against Tom Madra, a white person, in return for which [Berbling] would drop pending criminal charges against several of the [respondents]."

[5] Damages were also sought against Berbling for these practices and for an alleged conspiracy with his investigator, Shepherd, to

The District Court dismissed that portion of the complaint requesting injunctive relief against Berbling, as well as against Investigator Shepherd, Magistrate O'Shea, and Judge Dorothy Spomer, for want of jurisdiction to grant any such remedy, which was perceived as directed against discretionary acts on the part of these elected state officials. The Court of Appeals reversed, holding that whatever quasi-judicial immunity from injunctive proscription it had previously recognized was appropriate for a prosecutor, was not absolute, and since respondents' alternative remedies at law were thought to be inadequate, an injunctive remedy might be available if respondents could prove their claims of racial discrimination at trial.[6]

The Court of Appeals rendered its decision on October 6, 1972. At the subsequent election in November

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refuse to prosecute those who threatened respondents' safety and to prevent them from giving evidence against whites concerning acts threatening their personal safety. As to the latter, the sixth example in n. 1, *supra*, was reiterated. The Court of Appeals held that "insofar as defendant Berbling was acting within his prosecutorial function he has a quasi-judicial immunity from suit for damages under the Civil Rights Acts," 468 F. 2d 389, 410, and remanded to allow respondents to amend the complaint and to have the District Court determine in the first instance whether some of the acts then alleged would be sufficiently removed from quasi-judicial activity "to warrant removing the cloak of immunity from them." *Id.*, at 410–411. Berbling's petition for certiorari questioning this aspect of the Court of Appeals' ruling was not timely filed in this Court and has been denied. No. 72–1107, *post*, p. 1143. No question concerning damage relief is involved in the case presently before us.

[6] The scope of any injunction which might be found warranted was not finally established or restricted. It was suggested that an initial decree might require "only periodic reports of various types of aggregate data on actions on bail and sentencing and dispositions of complaints," and confidence was expressed that the District Court would be able to establish further guides as required and, if necessary, to consider individual decisions. 468 F. 2d, at 415.

which they complain. The plain fact is that, on the record before us, respondents have never charged Spomer with anything and do not presently seek to enjoin him from doing anything.[10] Under these circumstances, recognizing that there may no longer be a controversy between respondents and any Alexander County State's Attorney concerning injunctive relief to be applied *in futuro*, see *Two Guys* v. *McGinley*, 366 U. S. 582, 588 (1961), we remand to the Court of Appeals for a determination, in the first instance, of whether the former dispute regarding the availability of injunctive relief against the State's Attorney is now moot and whether respondents will want to, and should be permitted to, amend their complaint to include claims for relief

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[10] Despite the statement respondents made in their brief in opposition to the petition for certiorari, n. 8, *supra*, the record does not contain any indication that respondents have ever sought injunctive relief against Spomer in any proceedings in the District Court or the Court of Appeals. Nor would they have had reason to do so in the absence of knowledge that he would succeed Berbling. While Spomer did substitute himself in place of his predecessor, and his counsel made the somewhat extraordinary statement at oral argument that "there is nothing in this record, nor will there be on the part of my client, to indicate that he would change the policies which are alleged to have been exercised by his predecessor," Tr. of Oral Arg. 7, to determine whether respondents have a live controversy with Spomer, we must look to the charges *they* press. Indeed, counsel for respondents observed at oral argument of this case that "in order for us to proceed against Mr. Spomer, it would be necessary for us to investigate the facts to see that the concession apparently made by the State's Attorney is true and amend our complaint." *Id.*, at 19. This merely serves to underscore our concern that we are being asked to render an opinion on the merits of what is now and may continue to be a hypothetical or abstract dispute. See *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937); *United States* v. *Fruehauf*, 365 U. S. 146, 157 (1961); *North Carolina* v. *Rice*, 404 U. S. 244, 245–246 (1971).

against the petitioner. Cf. *Land* v. *Dollar*, 330 U. S. 731, 739 (1947).

The judgment of the Court of Appeals is vacated and remanded for further consideration and proceedings consistent with this opinion.

It is so ordered.